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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 9

JULIUS EMSPAK

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

DAVID SCRIBNER,
11 East 51st Street,
New York City.

FRANK J. DONNER,
ARTHUR KINOY,
104 East 40th Street,
New York City.

ALLAN R. ROSENBERG,
~~416 Fifth Street, N.W.,~~
~~Washington, D. C.~~

Attorneys for Petitioner.

Of Counsel,

DAVID SCRIBNER,
DONNER, KINOY & PERLIN,
by FRANK J. DONNER,
ARTHUR KINOY,
104 East 40th Street,
New York City.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 67

JULIUS EMSPAK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 353-363) is reported at 203 F. 2d 54. The opinions of Judge Kirkland (R. 116-131) denying certain pre-trial motions filed by petitioner and fifteen other individuals who were indicted for contempt of Congress appear at 95 F. Supp. 1010, 1012. The opinion of Judge Letts (R. 224-227) rendered at the conclusion of the trial and holding petitioner guilty is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254. The petition for a writ of certiorari was granted on October 12, 1953 (R. 371).

Statutes, Resolutions and Rules Involved

1. 2 U. S. C. 192, R. S. 102, as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. Rule XI(1)(q)(2) of the Rules of the House of Representatives, as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 828, and thereafter adopted by the House of Representatives (H. Res. 5, 81st Cong., 1st Sess., 95 C. R. 10 (1949), provides:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The language in the amendment of Rule XI by the Legislative Reorganization Act is substantially the same as the House resolution which initiated and continued the House committee in effect until the establishment of the present committee.[1]

Statement

1. The proceedings before the subcommittee of the House Committee on Un-American Activities

Petitioner, Julius Emspak, is the General Secretary-Treasurer of the United Electrical, Radio & Machine Workers of America (R. 160) (hereafter referred to as UE

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[1] H. Res. 282, 75th Cong., 3d Sess., 83 C. R. 7568, 7586 (1938); H. Res. 26, 76th Cong., 1st Sess., 84 C. R. 1098, 1128 (1939); H. Res. 321, 76th Cong., 3d Sess., 86 C. R. 572, 605 (1940); H. Res. 90, 77th Cong., 1st Sess., 87 C. R. 886, 899 (1941); H. Res. 420, 77th Cong., 2d Sess., 88 C. R. 2282, 2297 (1942); H. Res. 65, 78th Cong., 1st Sess., 89 C. R. 795, 810 (1943); H. Res. 5, 79th Cong., 1st Sess., 91 C. R. 10, 15 (1945); H. Res. 5, 80th Cong., 1st Sess., 93 C. R. 38 (1947).

or the Union), a national labor union representing employees in the electrical, radio and machine industry. He appeared on December 5, 1949, before a one-man subcommittee of the Committee on Un-American Activities of the House of Representatives consisting of Representative Morgan M. Moulder (R. 159, 239). The hearings in which petitioner testified were subsequently printed by the committee and are contained in a pamphlet entitled, *Hearings Regarding Communist Infiltration of Labor Unions—Part II (Security Measures Relating to Officials of the UERMWA-CIO)*, 81st Cong., 1st Sess. (R. 37).

During the course of the hearings petitioner was asked 239 questions. Some of these questions dealt with the union office held by petitioner, his background, the structure of the Union, the extent of its membership and bargaining commitments, the number of its organizers, the manner of their appointment, the composition of the Executive Board, the number of the Union's international representatives and their duties, the duties of the Union's Executive Committee, the manner in which grievances are adjusted, the official publication of the Union, the alleged similarity in policy between the Union publication and the Communist Party, the signing by petitioner of a non-Communist affidavit which was filed with the National Labor Relations Board, and related matters. The witness answered all of these questions (R. 159-199).

Included within the 239 questions which petitioner was asked were a series of 68 questions which gave rise to counts 1-68 of the indictment (R. 4-13). Declining to answer these questions, petitioner pleaded the First Amendment rights of free speech and free assembly and the Fifth Amendment. Relevant portions of the record are set out in the margin.[2] Of these 68 questions, some 58 sought from

[2] "Mr. Tavenner. Mr. Emspak, are you acquainted with Joseph Persily?

Mr. Emspak: Mr. Chairman, I would like to say something at this point.

(Footnote Continued on Page 5)

petitioner information as to the identity of and his acquaintance with certain named individuals (R. 4-12). Two counts in the indictment (counts 59 and 60) were based upon petitioner's refusal to answer questions concerning

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(Footnote Continued from Page 4)

Mr. Moulder. You mean in response to the question?

Mr. Emspak: I will answer the question; yes, in response to the question and as a statement of position.

What I say revolves around two points, one organizationally and another as an individual. Organizationally, my job as an officer of this union is to represent the interest of the membership as they determine it at the annual conventions and at other means they have of getting together and expressing themselves. My job is to administer that aspect to the best of my ability, using one very simple measuring stick, and that is: Does a given policy or action contribute to the well-being of the membership, individually and collectively?

As an individual I would like to say one thing, and that is this: The line of questioning that counsel is developing now is a line that has been used on numerous occasions by this committee and other congressional committees in an attempt to harass the union, its leadership, and its members. It is a line of questioning that goes against my grain as an American. I was born in this country. Everything I am——

Mr. Moulder: How long will this statement take, Mr. Emspak?

Mr. Emspak: About two or three more minutes.

Mr. Moulder: Proceed.

Mr. Emspak: Everything I am, I owe to the rich heritage and tradition of this country. I do not believe that a committee of this kind, especially in view of the recent record of this committee where it stooped to interfere in the partisan affairs of a local union, or any congressional committee, because of the rich tradition of this country which, if not perverted, will lead to a greater and better country—I don't think a committee like this or any subcommittee has a right to go into any question of my beliefs, my associations, or anything else. I have a couple of kids. They have a stake in this country, too.

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Mr. Emspak: Because of my interest in what is going on these days, because of the activities of this committee——

Mr. Moulder: Are you going to answer the question?

Mr. Emspak: Because of the hysteria, I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the First Amendment, supplemented by the Fifth. This committee will corrupt those rights.

Mr. Moulder: Do you think it corrupts you to answer the question?

(Footnote Continued on Page 6)

his affiliation with two organizations, the National Federation of Constitutional Liberties and the Civil Rights Con-

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(Footnote Continued from Page 5)

Mr. Emspak: I certainly do.

Mr. Moulder: Why does it corrupt you?

Mr. Emspak: Your activities are designed to harm the working people of this country. Every action this committee has ever taken has done that. You interfered last summer in the election of a local union at the request of a priest. You know that. You dragged down the prestige of this country" (R. 167-169).

Petitioner was then asked similar questions about other individuals, to which he replied (R. 171-172):

"Mr. Emspak: Mr. Chairman, on these questions, which are all essentially the same, of course, when this hearing was announced according to the press reports, at least, it was announced because this committee presumably was interested in finding out things with reference to individuals in our organization by using whatever means it has at its disposal, and for the purpose of trying to perhaps frame people for possible criminal prosecution.

I don't see how or why any individual should be subjected to that kind of questioning here if he is going to maintain, you know, his feelings on these questions, and I tried to express the feeling before when you interrupted me. I just don't intend, as I said then, to be a party to any kangaroo court proceedings of this committee or any other congressional committee. I think I have the right to reserve whatever rights I have in that respect to whatever appropriate bodies may be set up to deal with questions that come up.

Mr. Moulder: Do you mean to say you have people in your organization who have information that would subject you to criminal prosecution?

Mr. Emspak: No; I don't, Mr. Chairman. As a basic proposition—and it has worked over the years and over the last few months as far as this committee is concerned—a slick job——

Mr. Moulder: Do you know them or not?

Mr. Emspak: That does not concern this committee at all.

Mr. Moulder: Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?

Mr. Emspak: No. I don't think this committee has a right to pry into my association. That is my own position."

To several questions designed to probe the truthfulness of the affidavit which petitioner had filed pursuant to the provision of Section 9(h) of the Taft-Hartley Act (R. 194; Count 64 of the indictment, R. 12), he responded:

> "I understand an affidavit to be an affidavit, a document that is binding when one undertakes to subscribe to it. I further understand what the motives of this committee are, to establish a beautiful frame to hang people who try to comply with the law. O.K. The affidavit is binding, and that is that!"

gress (R. 12). The remaining counts in the indictment (61-68) are based upon the petitioner's refusal to answer certain questions with respect to his alleged membership in the Communist Party (R. 12-13).

After petitioner twice protested the interrogation and stated the reasons for his protests (R. 167-169, 171-172), the committee did not rule that his objections were ill-taken or his reasons for declining to answer unsound. It continued to ask questions concerning other associations (R. 172; Counts 7-58 of the indictment), to which petitioner responded only by adopting his earlier answer "for the reasons stated" (R. 172). The committee did, however, state on the record its reasons for persisting in the questioning. Thus, when petitioner, after a substantial number of questions had been asked and answered, first declined to answer a question and gave his reasons for such refusal, the committee responded (R. 169):

> "The purpose of this committee is to expose communism as it exists in this country."

At another point in the hearing the chairman stated (R. 191), "It is the function of this committee to expose communism and un-American activities." "Don't you believe that the rank and file of any union should have knowledge of communistic activities within the union, and should have an opportunity to be so informed, and that this committee is performing a service when it does so expose such communistic activities within a union" (R. 192). "We feel it is the duty of this committee to protect labor unions against Communist infiltration, and that we will try to do" (R. 195-196).

Petitioner, together with fifteen other individuals, was indicted for violation of Section 192 of Title 2, United States Code, by a grand jury impaneled on October 3, 1950 (R. 4-13, 116-120; 95 F. Supp. 1010, 1012). Of the sixteen individuals thus indicted, the following in addition to peti-

tioner are officials or members of the Union: Thomas J. Fitzpatrick, Thomas Quinn, James J. Matles, Frank Panzino, Talmadge Raley, Esther Tice. Of these seven individuals, two, petitioner and Thomas Quinn,[3] were found guilty of contempt.

The citations for contempt of the seven individuals resulted from three separate groups of hearings before subcommittees of the committee. The first series of hearings was held before a subcommittee of the House committee on August 9, 10 and 11, 1949. Two officials of the Union, Thomas J. Fitzpatrick and Thomas Quinn, appeared at these hearings and were cited for contempt.[4]

At the second group of hearings, held on December 5 and 6, 1949, to which reference has already been made, petitioner testified, as did James J. Matles, the Union's Director of Organization. The third Un-American Activities Committee hearings involving the Union were held from July 12 to 15, 1950.[5] As a result of their appearance at these hearings, Talmadge Raley and Esther Tice were indicted.

2. The proceedings below

On December 17, 1950, petitioner filed a motion to dismiss the indictment. The grounds of this motion included the contentions that the questions asked exceeded the bounds of legislative inquiry and were not pertinent to any question properly under inquiry by the committee; that the statutory provision invoked by the indictment inherently and as applied exceeded the bounds of the constitutional power of

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[3] See *Quinn* v. *United States*, No. 66 this Term, petition for writ of certiorari pending.

[4] 1 *Infiltration—Labor Unions* (1949).

[5] *Cincinnati, Ohio, Area* (1950). A fourth series of hearings involving the Union was held on August 29, and 30, 1950. See 3 *Infiltration—Labor Unions* (1950).

investigation; that this statutory provision and House Resolution 5, inherently and as applied, are violations of the First Amendment, are unconstitutionally vague and violate the constitutional privilege against self-incrimination (R. 14-15).

An affidavit in support of the motion to dismiss which the government did not controvert charged that all of the three hearings in which the Union, its officers and its members were involved are unified and condemned by an exertion of unconstitutional powers and by "objectives totally unrelated to the legitimate legislative business of the committee or the House of Representatives" (R. 18). It charged that the hearing of August 9, 1949, had "the objective of interfering with and influencing the outcome of a local union election then pending in Pittsburgh, Pennsylvania" (*ibid.*), and that the purpose and timing of this hearing was determined after consultation with and to give support to an inner union clique; that the hearing which gave rise to the instant case had as its actual objective an attempt "to disclose a possible violation of Section 80 of the Criminal Code for false statements made in the so-called Taft-Hartley non-Communist affidavits" (R. 21), and that the third hearings of July 1950 were held in order to serve as a privileged forum for a series of partisan anti-labor articles, and that the entire questioning of one of the witnesses, a union member, was based upon a document, subsequently admitted to be a forgery by a committee member (R. 21-24). A second affidavit, filed by petitioner (R. 29-36), charged that on the day after he had received a subpoena the *New York Times* published a report, based upon a committee release, that the committee "was looking into the validity of non-Communist affidavits filed by officers" of the Union (R. 30, 39), that petitioner had been accused of being a Communist and individuals concerning whom he had been interrogated had been so accused (R. 30-32, 35).

On January 31, 1951, Judge Kirkland ruled that the counts involved in the instant indictment as well as several other indictments with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was a specific phase of inquiry then being considered by the committee" (R. 119, 125; 95 F. Supp. 1012, 1016). This "single line of inquiry" was the "exposure" of Communists.[6]

After a trial without a jury before Judge Letts, the petitioner was found guilty of contempt as charged (R. 227) and sentenced to imprisonment for a period of six months and a fine of $500 (R. 233).

After an appeal was argued in October 1951 before the judges of the lower court, reargument was *sua sponte* ordered before the court *en banc*. After reargument in May 1952, the Court of Appeals on December 19, 1952, handed down its opinions. The opinion of the court was written by Judge Clark for himself and Judges Miller and Proctor. A concurring opinion was written by Judge Prettyman for himself, Chief Judge Stephens and Judge Washington. Judge Bazelon dissented for himself and Judge Edgerton, while Judge Fahy concurred in part and dissented in part.[7]

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[6] The committee chairman stated as much (R. 169, 191, 195-196), both with respect to the instant hearing as well as with respect to the hearing involved in *Quinn* v. *United States*, *supra*, of which the instant hearing was stated to be a continuation (R. 157).

[7] Some of the issues were further discussed in *Quinn* v. *United States*, 203 F. 2d 20, and *Bart* v. *United States*, 203 F. 2d 45, cases in which petitions for writs of certiorari are now pending in this Court.

Summary of Argument

This case comes to the Court at a time when the freedoms protected by the First Amendment are at their lowest ebb. Consistent retreats in the enforcement of First Amendment rights have removed barriers to a spreading wave of repression. Security has been mechanically exalted and the claims of the Constitution pushed aside. At a time when we proclaim to the world our dedication to freedom we are unfree as never before.

This case lies at the heart of any answer to the question, how are we to recover our rapidly vanishing liberties. For it is the House Committee on Un-American Activities and its resolution which have contributed more heavily than any one law or governmental agency to our present plight. It is the committee which has fostered the present climate of fear, intimidated all forms of political expression, popularized the political test oath and undermined the right of assembly. It is the committee which has reversed the traditional role of the federal government as a guardian against the invasion of the civil liberties of local individuals and groups. It is the committee which has contributed heavily to making the issue of communism a barrier to the solution of the political problems which confront us.

The committee has broad and indeed unprecedented powers. The resolution creating it deals solely and exclusively with propaganda. The resolution's operative terms refer solely to propaganda. If propaganda were substracted from the resolution there would be nothing left.

The fact that Congress singled out in this resolution speech alone for investigation must be deemed to be a deliberate act, for the distinction between speech and conduct is a basic one in our public law. The fact that the

resolution has as its subject matter the dissemination of ideas means that the resolution must comply with the standards of the First Amendment. We have not yet reached the point where speech alone, unrelated to any substantive evil, can serve as the basis for congressional action. The resolution invades freedom of expression in an important way since the committee exercises its jurisdiction by labelling certain ideas in the light of the standards of the resolution.

But the resolution really has no standards. The term "un-American" is merely an epithet with no fixed content. The same is true of the term "subversive." The third kind of propaganda which the committee is authorized to investigate is propaganda which "attacks the principle of the form of government as guaranteed by our Constitution." This phrase suffers from comparable ambiguity. See *Schneiderman* v. *United States*, 320 U. S. 118, 138, 144, 145. It is characteristically used to lend prestige to movements in opposition to economic change or political reforms. Certainly, a basic principle of our form of government is freedom of thought and of political affiliation and expression. The record of the committee itself establishes the danger of this phrase as a tool for classifying ideas. The committee, through its counsel, once sought to investigate an organization because its literature referred to "democracy," a term which was alleged to be inconsistent with the provisions of the Constitution.

The legislative background and committee interpretation of the terms of the resolution are not helpful in limiting its scope. When the resolution was initially passed in 1938, members of Congress unsuccessfully sought to have its meaning defined. The members of the committee themselves in 1940, during the debate on the reenactment of the resolution were in conflict on the meaning of the term "un-American." And in 1942 a minority report of the committee complained of the majority's tendency to brand as subversive and un-American viewpoints which it disapproved.

In 1945 the committee sought aid from a private institution in interpreting the resolution. Its own interpretations of the term "un-American" have included such standards as the denial of the existence of a God, absolute social and racial equality, destruction of private property, advocacy of a planned economy and opposition to the system of checks and balances. In 1946 the chief counsel for the committee wrote that it had adopted no definition of subversive or un-American activities.

That the Court has under review a resolution the scope of which is neither defined or definable is seen from the fact that the committee itself recognizes no limitations on the permissible range of its activities.

The unconstitutional range of the resolution is best seen from the committee's application of it in its day to day functioning. In the course of hearings the committee, or various of its members, has characterized as "un-American" such programs and issues as the legislation proposing the reorganization of this Court, criticism of itself, of members of Congress, of the FBI, and support of New Deal legislation. In the same way, belief in the extension of universal suffrage, support for Harry Bridges, advocacy of anti-polltax legislation and criticism of the McCarran-Walter Immigration Act have been characterized as evidence of subversion. The resolution has been applied in these ways to a wide variety of occupational groups, many of whom function through the exercise of First Amendment rights, sometimes on a wholesale geographical basis.

It cannot be doubted that only the personal prejudices and private interests of the committee members serve as limits to the scope of the resolution.

The resolution on its face is constitutionally invalid because it takes as its target the circulation of ideas. As it has been consistently construed, it abridges the kind of speech, public discussion and political expression, which is of key importance in our constitutional system. *DeJonge*

v. *Oregon*, 299 U. S. 353. Special considerations contribute to the unconstitutionality of the resolution. These are its vagueness and its breadth. The vagueness of the resolution makes it a formidable threat to the freedom of expression; the broad scale of its terms insures that such threat will penetrate and impair an almost limitless range of public expression. If the resolution has a legitimate goal, it is fatally broad. The number of the innocent victims of the resolution far outweighs the benefits which may be speculatively ascribed to it. This Court has never had a case before it which more imperatively calls for the invalidation of legislation on its face than does this resolution.

The resolution cannot be limited so as to confine it to constitutional inquiries. The history of its application makes this clear. Moreover the resolution contains no standards which would be useful in narrowing its scope.

A possible ground of support for the resolution is that the time has come when public discussion of dangerous ideas must be suppressed. But the justification of security cannot change the fact that under our government the people are trusted to choose for themselves, even where the issues are extremely grave. Nor may the resolution be justified by treating the ideas denounced in it as punishable per se in the same manner as slander or obscenity. This is impossible under our political system.

The fact that speech is not punished outright as by fine or imprisonment does not spare the resolution. The committee is authorized to censor and the fact is that the committee's investigations restrict speech as well as the freedom to speak.

The cases supporting the resolution rely heavily upon the view that the First Amendment does not limit the power of inquiry, but this Court's decision in *United States* v. *Rumely*, 345 U. S. 41, disposes of this notion as it does of the notion that the possibility of the production of valid legislation is a sufficient compliance with the test of con-

stitutionality. Although we doubt that valid legislation can emerge from an exercise of the committee's jurisdiction, that test is particularly inappropriate for this resolution. It would strain language and history to ignore the fact that the resolution basically has no legislative purpose. The congressional act authorizing the exercise of the power of inquiry must conform to the First Amendment rather than resulting legislation which it is not the primary purpose of the resolution to produce.

II

A study of the record of the committee's activity confirms in detail what has been said with respect to the vagueness and range of the resolution. An analysis of the committee's hearings, reports and other relevant documents establishes that the uniquely distinguishing characteristic of the committee's functioning is a system of exposure which contributes new elements of unconstitutionality to the resolution. The committee does not investigate in aid of legislation but engages in a form of ideological warfare against people and associations. This program of mass persecution contemplates a deliberate destruction not only of the civil liberties of persons and organizations, but also of the personal rights and interests of the witnesses called before the committee.

The hallmark of the committee's functioning on which we lay great stress in this brief is the fact that the committee is an instrumentality for attacking individuals and this not as an incident to some ultimate legislative purpose, nor as a means of identifying sources of propaganda, but as an end in itself.

From the beginning of its functioning the committee has used the term "exposure" to describe a *modus operandi* under which the political attitudes and affiliations of indi-

viduals are disclosed in as unfavorable a light as possible so that strong private sanctions such as loss of employment, social ostracism and community disapproval may be directed against them. Beginning in 1938 and up until the present, the committee has proudly boasted of its exposure function. In this very case, the overriding justification for the inquiry was this same exposure purpose.

The matrix of the exposure system is the committee's file and reference service which is a constantly growing catalogue of political dossiers. By the end of 1948, there were 300,000 references on the activities and affiliations of individuals and the committee had compiled reports on over 25,000 persons and 1768 organizations. Since then the files have continued to grow so that during 1950 the card references had increased to over half a million. The full quantitative extent of this political identification is detailed in the brief. This file and reference service is not highly restricted. The material in it is available to every member of Congress and has been supplied to members of the public. There is no legislative purpose in this political identification system, which is not distinguishable from the files maintained by totalitarian regimes. It is an intimidating device of formidable proportions and sharply underlines the fact that the committee is primarily an instrument for attacking people.

It is standard committee practice to interrogate witnesses under oath and threat of contempt concerning their political views and affiliations with a wide variety of organizations. The purpose of this kind of interrogation is the exposure of the individual rather than any legitimate legislative objective. In pursuance of its exposure aims, the committee goes far beyond an inquisition into political affiliation. It consistently demands answers to questions in the areas of personal associations, opinion and belief. Witnesses are asked about the fraternal organizations they belong to, the birthplace of their parents, their sal-

ary, the age of their children, their marital affairs. In the same way interrogation is conducted into matters of political opinion and belief over a wide area. Witnesses are asked such questions as whether they believe in giving Negroes the right to vote, or in intermarriage between Negro and white. Witnesses are likewise queried concerning their religious beliefs and affiliations. They have been asked whether they are gentile or Jew, whether they are a member of any church, whether they recognize a Supreme Being, whether or not their parents were orthodox Jews. Here, too, it is manifest that the committee's purpose is harassment and persecution and not legislation.

The committee's exposure program contemplates that by bringing to bear upon the individual in a dramatic way the force of governmental disapproval of his political views and affiliations, punishment through private sanctions will be sure to follow. The committee goes to great lengths to make certain that the record creates the fullest opportunity for the operation of these sanctions. Thus it insists that witnesses put their names and addresses on the record, even though that information is known to the committee and even when the individual expresses a fear of harassment. In the same way the committee forces witnesses to reveal other known details about themselves and their lives for the record. The purpose to punish is likewise reflected in the committee's insistence that a witness restate his address after he had invoked the privilege against self-incrimination. The same purpose is further revealed by the committee's contrasting treatment of a cooperative witness. When such witnesses ask that their address be withheld, their requests are usually granted.

Witnesses before the committee are divided into two groups, hostile and friendly. In order to gain the committee's approval as a friendly witness, one is required to identify his own political views and affiliations and inform on others as well. As we have shown, the committee's stock in trade is a huge file of "names." The life blood

of the exposure operation is a never-ending stream of individuals. Friendly witnesses replenish the stream with lists of their former political associates.

While the committee relies for its names on the testimony of friendly witnesses and professional informers, it persists in asking hostile witnesses to supply names, not with the expectation of a responsive answer but because it knows that the mere mention of a name and the refusal by the witness to identify it will accomplish its purpose.

The committee does not hesitate to seek information about individuals who have no connection at all with the matter under inquiry, such as high school children who act as counsellors at a summer camp or individuals attending a social gathering at which a Communist was present.

The exposure system requires a thorough conditioning of the public mind and the committee uses publicity both to promote approval of its activities and to prejudice and intimidate the witness. Publicity is a means of insuring the maximum injury to the witness. The hostile witness is made the victim of a spectacle, complete with floodlights, television and news reel cameras, designed to ruin him in the public eye. The logic of the committee's existence compels it to promise sensational revelations, to accuse before hearing, and to make its own disclosures as theatrical as possible.

The committee's attack on the individual does not end with exposure. It seeks dismissal from public and private employment and from union office of persons it considers subversive. To this end it cooperates with private groups and boasts of the fact that its hearings have resulted in economic injury to particular individuals. Witnesses appearing before it have charged that the mere publicity resulting from a subpoena has been sufficient to cause loss of employment, and recently the committee offered to help a witness obtain reinstatement if he would not rely on his constitutional rights. These uses of pub-

licity and the stimulation of private sanctions could hardly be less related to any legitimate purpose.

The committee does not expose individuals alone; it also exposes a wide variety of organizations, causes and movements which function through free assembly and association. The "subversive" organization is the vehicle through which the committee has increasingly expanded its jurisdiction and activity. The committee has devised an elaborate genealogy of subversion by which it measures an organization's consanguinity to the Communist parent stock.

The attack on organizations is completely divorced from their propaganda, just as the attack on individuals has no relationship to propaganda. Organizations which issue no propaganda at all are condemned with the same severity as those which do issue propaganda. The committee publishes a guide to subversive organizations. A listing in this *Burke's Peerage* of organizational subversion is the equivalent on the associational level of the exposure of an individual.

By now over 700 organizations and publications have been thus listed by the committee. In its listings the committee's chief form of proof is guilt by parallelism or mutual object. Once the organization is listed as subversive its members are condemned through guilt by association. The committee's attacks on organizations add to the evils of the resolution a sharp interference with freedom of assembly and of the right to engage in concerted activities.

The lack of legislative purpose in the committee's attack on organizations finds particularly clear expression in its intervention in labor matters. Almost from the beginning the committee made it a practice so to time its subpoenas and hearings as to ally its force and prestige with employers engaged in disputes with labor unions or with particular union factions. This anti-labor activity of the commit-

tee is not confined to the union involved in this case, but has been directed against a large number of unions and, indeed, the labor movement as a whole. On some occasions the intervention of the committee is flagrant, as for example when a committee member conducting a hearing during the course of a major strike, admitted that it was done as the result of a local request. Similarly, during a 1950 employee representation election campaign a union organizer was subpoenaed to appear before the committee to the accompaniment of screaming headlines in the local press. The union organizer responded to the subpoena on the return date but was never called to a hearing. In the same way during a recent department store strike in New York the officers of the striking union were told by the employer that the committee would be brought in. And it was. While the committee sometimes strives to give "security" coloration to its attacks on unions, this is shown to be a pretext for anti-labor partisanship.

The committee's procedures reflect its exposure purposes. The friendly witness is allowed complete latitude, but the hostile witness is denied all procedural rights. The friendly witness is invited to fill the record with his observations, but the hostile witness is confined to yes and no answers. The committee rejects affirmative evidence from hostile witnesses, especially if it involves criticism of itself.

The committee theoretically recognizes the right to counsel, but the very fact that a witness appears with counsel makes him suspect, and exercise of the right is discouraged. Indeed, counsel themselves have been attacked during the course of the hearing. If counsel consults with his client he runs the risk of being charged with coaching, and he is even denied the right to protest such a charge since under the committee rules counsel may not address it.

The unfriendly witness is given no notice of the charges against him or advance explanation of the reasons why his

presence is required. He is denied the right to cross-examine his accusers and sometimes finds that the committee has publicized a condemnation of him long before he reaches the witness stand.

In addition to the public hearing the committee frequently conducts executive sessions. This is to rehearse friendly witnesses, to coax witnesses into naming others when they might be ashamed to do so in public, and to inform the committee as to what lines of inquiry lack publicity value for public hearings.

An overall view of the committee functioning makes it manifest that the committee is really a new kind of tribunal, alien to the American constitutional system. It is only in name a committee in aid of a legislative purpose. Indeed, of all its activities, its legislative activities are least important and extensive. During the period of the committee's existence as a standing committee and up until the end of 1952, only a minute portion of the committee's published hearings dealt with proposed legislation.

The committee actually functions as a super-legislature which has created new political offenses which Congress constitutionally could not create. It spends all of its time policing these unconstitutional crimes and punishing those whom it finds guilty through its own unique sanction—exposure. This aspect of its activity combines the functions of a governmental detective agency, a grand jury and a court. Its filing and investigative activities resemble those of a governmental police force, but in contrast to the FBI the committee not only accumulates facts but it discloses them. The committee regards itself as a grand jury and has made many recommendations that individuals be prosecuted.

Many of its functions resemble those of a court and a member of the committee has referred to it "as the greatest open court in the country." The committee acts in a

judicial way, for it determines the guilt or innocence of the witnesses which it subpoenas. It does not hide this fact, it openly proclaims it. The committee not only punishes the political wrongdoer; it also clears the repentant political sinner. An increasing number of hearings is devoted to witnesses who seek clearance. As a matter of fact the committee is used as a clearance forum even by those who have not been directly attacked before it.

The committee functions in areas for which other governmental agencies have primary responsibility and as a result is engaged in constant conflict with them. The committee has clashed with governmental loyalty boards, the Atomic Energy Commission, the FBI, the armed forces intelligence units and federal grand juries. It has repeatedly feuded with the executive for access to personnel files.

The committee's political partisanship is notorious. At the outset of its functioning it used charges of subversion among government employees as a means of combatting New Deal programs. The partisanship of the committee was exposed most recently in the issuance of a subpoena by its chairman upon former President Truman. The committee does not hesitate to intervene in national and local elections. It did so in the 1944 national elections and in local elections in Michigan and Minnesota. More recently it interfered in elections for the Los Angeles Board of Education.

The committee's partisanship may also be seen in the manner in which it assigns committee members to conduct hearings in their home states in order to permit them to campaign for election or in some other way advance their political ambitions.

The committee uses its powers for political purposes through the issuance of its own propaganda. This program is designed to insure that all of the political crimes which the committee has legislated into existence are defined in sufficiently horrendous terms so that the commit-

tee's exposure of the witness will bring into play harsh private sanctions.

That the resolution, as consistently applied during the entire life of the committee, violates the Constitution can hardly be doubted. The government has no power to classify or censor ideas; it has even less power to exert its authority against individuals for the purpose of exposing their link to ideas and organizations whose expressions and functioning constitute the exercise of First Amendment rights. The attack on dissent has literally led to the attack on dissenters. The rights of assembly and political expression which the resolution and the committee have attacked in the crude way we have described are deeply rooted in our constitutional system and occupy the highest place in the hierarchy of constitutional values.

And we must recognize that opposed to these precious rights is the exercise of the power of inquiry which is subject to certain well-established and clearly understood limitations. It must be emphasized that it is because the power of inquiry is involved and not in spite of it that the resolution is unconstitutional. The scope of this power is plainly limited by the legislative function, and one would be hard put to it to find a congressional committee whose functioning has so little meaning for the legislative process. In addition, congressional inquiry is unauthorized into personal and private affairs. The right to be let alone in one's personal concerns is deeply rooted in this country and yields only to a pressing legislative purpose and even then only to the extent that this purpose makes such intervention necessary. Further, the procedures of the committee are flagrantly unjust; it affords the witness called before it none of the elemental procedural decencies and is motivated by patently partisan objectives. These evils have been deemed to require close judicial supervision. Finally, the area in which it is proposed that the power of inquiry be exercised must be defined with precision. This is so not only to reassure private citizens that their political activi-

ties will not be needlessly investigated but to give the witness a clear guide to the questions which he has a right to refuse to answer. It was an important purpose of the contempt statute, Section 192, to make congressional contempt an offense with clearly defined content.

As we have shown, the resolution, which gives content to the offense because it measures the pertinency of the questions put to the witness, is hopelessly vague.

III

Even if the resolution could have some conceivable constitutional application it could not be validly applied to petitioner. The decision of the Court in the *Rumely* case makes it clear that the enforced disclosure of the identity of an individual because he exercised a right protected by the First Amendment is unconstitutional. The Court therefore narrowed the scope of the resolution involved in the case so as to exclude from it the authority to investigate activities involving such disclosure. The Court's decision is no innovation. See *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; *American Communications Association* v. *Douds*, 339 U. S. 382; *Thomas* v. *Collins*, 323 U. S. 516.

The essential attribute of political liberty is that political expression must be free of precisely the kind of exposure which is the committee's chief stock in trade. The Constitution would be meaningless if its protections were denied to groups forced to exercise political rights in private. The same reasons which have been recognized by the government as requiring anonymity in the protection of the rights of labor are applicable to political expression. It is a reality of the political process that the group in power, unless restrained, seeks to eliminate opposition, and protection against such attack requires freedom from compulsory disclosure. Indeed, the protection against com-

pulsory disclosure which is provided by the Fifth Amendment is closely linked with the struggle against political absolutism. The Court's decision in *American Communications Association* v. *Douds, supra,* makes it clear that constitutional limitations must be met to justify enforced disclosure of membership in the Communist Party. Moreover, inquiry into Communist Party membership is at the root of the committee's far-flung witchhunting practices.

Even if the resolution could conceivably be constitutionally applied it cannot and should not be construed to justify compulsory disclosures. To do so would create a conflict with the First Amendment as well as with the personal and private interests of the witness even when no legislative purpose is present. Of all of the operative terms of the resolution, the term "propaganda" is the clearest. It certainly does not give the committee jurisdiction to investigate the political coloration of individuals and organizations wholly divorced from a context of propaganda. The purpose of the interrogation here was not to identify the witness with propaganda, but to expose him. Indeed, the inquiry into propaganda had nothing to do with the questions asked and the reasons why they were asked. And the phrase "propaganda activities" does not expand the committee's jurisdiction to exact compulsory disclosures as an end in itself. It must be recalled that the comparable phrase "lobbying activities" was powerless to justify the modest claims made for the resolution involved in the *Rumely* case.

This Court is under a duty to construe the language of a statute so as to protect constitutional rights. It must, therefore, at a minimum construe this resolution so as to exclude from its purview the entire exposure program of which compulsory disclosure is a distinguishing feature. The Court would have to strain language to do otherwise.

Nor is the government's position improved by the other purposes ascribed to the inquiry. At the trial it was

claimed for the first time that the inquiry was specifically for the purpose of investigating various governmental ways of screening union officials for security purposes. How was this related to the investigation of propaganda? Undoubtedly because it was unrelated committee counsel added at the trial that the hearing followed in time the reference to the committee of the Wood Bill, H. Res. 3903. This is clearly a makeweight, not only because it was conceded that petitioner's testimony was not elicited to shed light on the bill, but also because the bill has nothing to do with either labor unions or labor union officials, but is confined to barring from employment in defense plants certain broadly defined groups of "subversive" workers. The subject matter of the bill is thus divorced both from the resolution and from petitioner. In addition, the government has conceded that the bill is both unconstitutional and unnecessary. We are finally left with the basic purpose of the inquiry as conceded at the hearing, namely, exposure, a purpose which is not legislative and is plainly unconstitutional.

IV

Petitioner relied not only on the First Amendment but also on the Fifth Amendment protection against self-incrimination. The issue in this case is whether his use of the phrase, "the First Amendment supplemented by the Fifth Amendment" which was followed by the expression of fear of "possible criminal prosecution" constituted an adequate assertion of the privilege.

This Court has repeatedly stressed the fundamental importance of the privilege and the need to give it a liberal construction in order to give effect to its purpose. The court below failed to give petitioner's assertion a liberal construction and moreover ignored his express reference to fear of possible criminal prosecution. Because the incriminating subject matter embraced petitioner's political affilia-

tion, he naturally referred to the First Amendment and to the Fifth Amendment. Put the fact that he also referred to the First Amendment does not deprive him of the protection of the Fifth Amendment. There is an historically close relationship between the two and a court must recognize this in construing the privilege. Moreover, it is clear that reliance upon reasons other than self-incrimination does not dissolve the protection of the privilege.

At one point petitioner gave as his reason for refusing to answer a question the fact that the committee had no right to pry into his associations, and not his fear of criminal prosecution. The court below gave undue significance to this single answer and ignored the entire line of inquiry of which it was a part. This entire line of inquiry establishes that the witness clearly communicated his fear of prosecution and that his answers to the key and controlling questions in the line of inquiry all reflected his fear of criminal prosecution. The decisions of this Court and lower courts dealing with comparable contentions in respect to the insufficiency or disclaimer of assertion of the privilege against self-incrimination, all insist that the answer must be read in the light of the entire context of the case and of the setting of peril. There is an overriding policy against lightly inferring a waiver of constitutional rights or treating a slip as an abandonment of such a right. *Smith* v. *United States*, 337 U. S. 137.

V

Petitioner was not directed to answer the questions put to him. This is a fatal defect since there must be a disobedience of a direction to answer before there can be a case of contempt under Section 192.

A majority of the court below recognized that petitioner had raised objections which required some action by the committee before he could be held in contempt. We sub-

mit that the action must be a direction to answer the question, and that anything short of a direction fails adequately to protect the witness. It is significant in this regard that the House committee in other cases has followed the practice of directing the witness to answer when it overruled his objections and the Senate Judiciary Committee has always done so.

The court below refused to apply the same standard of explicitness to the direction requirement which it imposed upon petitioner's assertion. The court below held that petitioner was made aware that the committee desired his answers, despite the grounds advanced for refusing. Even if this were a proper standard, rather than a standard of explicit instruction to answer, it involved a material element of the offense which could be resolved only by the trier of fact. The court below recognized as much in *Quinn* v. *United States, supra.* The opinion of the trial judge demonstrates that he did not in any way consider the question of whether the committee intended that petitioner answer despite his objection.

ARGUMENT

POINT I

The resolution is unconstitutional inherently and as construed by the committee.

In recent years a substantial number of cases have come before the Court in which it has consistently upheld limitations upon the exercise of constitutionally protected civil liberties. Undeniably the Court has greatly expanded the permissible area of restraint and in so doing it has accepted every justification advanced in the name of security and rejected every appeal to vindicate the guarantees of

the First Amendment. And it has been all too quick to find some special occupational or other circumstance to justify denial to particular persons or groups of rights theoretically granted to the entire population. In the scale of constitutional values of this democracy, it would seem that limitations on the liberty of the individual imposed in the name of security, however remote the substantive evil or national danger might be from the activity regulated or prohibited, are assigned the greatest weight and receive the unquestioned deference of our courts. The freedom to speak, to entertain non-conformist opinions or to engage in unorthodox political expression, on the other hand, has been subordinated to the lowliest rank. It would seem that no right, however private, personal or insignificant, comes to court with less hope of vindication than the rights protected by the First Amendment.

The effect of this rapidly progressing devaluation of the First Amendment has not been confined to its direct victims. This country has become the theater of spreading repression, the frightening character of which has not been lost on our allies abroad. The instruments of government obsessively develop variations on the theme of the "Red Menace" and the "Red Plot" to perpetrate greater and greater outrages on political liberty. The courts have become both victims of and contributors to this process. A few well-placed references to conspiracy, sabotage, espionage and other fear-engendering terms, are all that is needed to obtain judicial sanction for the most irresponsible invasions of civil liberties. After paying lip service to the conflicting claims of security and liberty, the courts with varying degrees of reluctance add their blessings to new repressions which in turn are exploited to carry the cycle farther. At a time when we proclaim in the chambers of international tribunals our dedication to freedom and fill the air waves of the world with the boast that we are a free people, we are unfree as never before. Vir-

tually every sensitive observer of our national life agrees on this unhappy fact.[8] It is no exaggeration to say that the First Amendment threatens to become a historical curiosity with only enough force to prevent bigots from persecuting small religious sects or censoring films, but powerless to enable us to make those decisions by which a democracy determines its fate.

Yet it would be wrong to conclude that we have accepted with either resignation, hopelessness or indifference the disaster that faces us. All over America men are asking, how did we come to this pass and how shall we get back?

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[8] See, e.g., O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592; Chafee, *Letter to Honorable Alexander Wiley*, 94 C. R. A3848 (1948); *Letter to the President by Members of Yale Faculty of Law*, 4 A.B.A.J. 15, 16; Andrews, *Washington Witch Hunt* (1948); Barth, *The Loyalty of Free Men* (1951); Stewart, *The Year of the Oath* (1950); *A Letter to Presbyterians Concerning the Present Situation in Our Country and in the World*, General Council of the General Assembly of the Presbyterian Church in the United States of America (1953); *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947); Biddle, *The Fear of Freedom* (1951) with introduction by Harold L. Ickes; Douglas, "The Black Silence of Fear", *New York Times Magazine*, Jan. 13, 1952; Mather, "Education for Democracy Endangered", *The Churchman*, Nov. 1, 1948; Miller, *The Judges and the Judged* (1952); Commager, "Guilt—and Innocence—by Association", *New York Times Magazine*, Nov. 8, 1953; MacLeish, *Freedom is the Right to Choose* (1951); Wilcox, ed., *Civil Liberties Under Attack* (1951). Address of Paul Hoffman before the Indianapolis Bankers Association, *New York Times*, Oct. 19, 1951; Address of the Honorable Theodore McKeldin, Governor of Maryland, to the Maryland State Teachers Association, *New York Times*, Oct. 19, 1951; Chafee, Jr., *Thirty-Five Years of Freedom of Speech* (1952), 34; Fine, "Creeping Paralysis in our Schools", *New York Times*, May 10, 1951; Address of Senator Herbert H. Lehman, before the National Community Relations Advisory Council, *New York Times*, Oct. 11, 1952; Address of former President Harry S. Truman to nationwide audience, Nov. 17, 1953; Address of Adlai Stevenson before leaders of Democratic Party, *New York Times*, Sept. 13, 1953. In an appendix to this brief we excerpt statements of prominent Americans on the committee and its impact.

Of course, there is no single answer. But this case lies at the heart of any answer. It is by no means extreme to state that the committee and its resolution have contributed more than any one law or governmental agency to our present plight. It is the committee which has fostered among our people the carking fear that our country is rotting with subversives and that non-conformity and dissent mask espionage and sabotage. It is the committee which has made the political test oath a distinguishing feature of American life. It is the committee which through the use of guilt by association and even more repellent forms of proof has made a joke of the right of assembly. It is the committee which has conditioned the public mind to the desirability of doing injury to the political dissenter and harnessed hysteria to smear. It is the committee which has contributed most to converting the federal government in Washington, under our political system a traditional haven of refuge and protection for those locally oppressed and persecuted, into a national inquisitor, passing upon the political orthodoxy of little people and prodding local institutions and communities into persecutive cooperation.

It is the committee which has done most to rob the administration of justice of vigor and independence when the First Amendment comes to court. It is the committee which has made the issue of communism an instrument of partisan political warfare and a barrier to the rational solution of the political problems which confront our time. Just as the invalidation of the resolution is an indispensable prerequisite to the recovery of constitutional liberty in this country, so judicial approval of the resolution or of the disclosures compelled under it would give new sanction to the repressive system of government by political investigation which we call McCarthyism.[9]

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[9] As Professor Robert K. Carr observes: "It may fairly be asserted that McCarthyism would never have been possible had not the Un-American Activities Committee, and its predecessor, the Dies committee, paved the way from 1938 on." Carr, *The House Committee on Un-American Activities 1945-1950* (1952), 455-456.

To urge that the resolution is condemned by the First Amendment is surely one of the most cautious understatements in all constitutional history. The resolution is as violently at war with that Amendment as a statute providing for a hereditary monarchy to rule the United States would be with Article II of the Constitution. It is flatly inconsistent with the plain language of the Amendment, with the reasons which brought it into being and the values it was designed to protect.

A. The resolution authorizes censorship of ideas.

The Committee on Un-American Activities of the House of Representatives was created in 1938 as a temporary, special investigating committee for the purpose of conducting an investigation into: "(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." The committee's authority was continued by the successive resolutions of each succeeding Congress until 1945, when by amendment of the House rules, the committee was added to the list of standing committees of the House.[10] The committee retained this status under the Legislative Reorganization Act of 1946.[11] For the purposes of its investigations, the committee is authorized to conduct hearings at any time or place within the United States, whether or not the House is sitting, has recessed or adjourned. It is the only investigating committee to

[10] See note 1, *supra*.

[11] P. L. No. 601, Sec. 121 (b) (q), 79th Cong., 2d Sess. (1946).

achieve the status of a standing committee,[12] and was the first committee with permanent authority to require the attendance and testimony of witnesses and the production of documents.[13] It is the only House committee with such power under the Legislative Reorganization Act of 1946. As one of its former members has said, it is "the most powerful [committee] in Congress."[14]

The sole and exclusive subject matter of the resolution is, and has been from the beginning,[15] propaganda. This is apparent both from its language and the internal interrelationship of the resolution's clauses. The first clause does not authorize an investigation into conduct or into "un-American activities", but only into those activities

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[12] See remarks of Representative McCormack, 91 C. R. 13, 14 (1945).

[13] H. Res. 5, 79th Cong., 1st Sess., 91 C. R. 10, 15 (1945). Throughout this brief we refer to H. Res. 5 and the corresponding provision of the Legislative Reorganization Act as "the resolution".

[14] Mundt, "What is Un-American Activity?" *Liberty*, Sept. 22, 1945, p. 19.

[15] The 1938 resolution is modeled on the resolution adopted in March 1934 authorizing an investigation of (1) nazi propaganda activities; (2) "subversive propaganda * * * instigated from foreign countries"; and (3) related questions which might aid in legislation. H. Res. 198, 73d Cong., 2d Sess., 78 C. R. 4934, 4949. For the background of the committee, which seems to have been strongly marked by an anti-alien coloration, see Ogden, *The Dies Committee* (1945) 3-38. Perkins, *Congressional Investigations of Matters of International Import*, 34 Am. Pol. Sci. Rev. 284, 286 (1940), has this to say about the committee's background:

> "The investigation of communism [in 1930] conducted by Representative Hamilton Fish was, on his own admission, an attempt to collect facts supporting, and even requiring, the deportation of alien Communists. The Nazi investigation, or the investigation of 'un-American activities' as it was later called, was somewhat more inclusive, but had the same purpose. Mr. Dickstein, as chairman of the House Committee on Immigration, was, no doubt, motivated by the desire to increase the business of that committee. The current Dies investigation on the same subject has largely the same background and purpose."

which take the form of "propaganda". The second clause of the resolution in no way expands its basic subject matter. It merely particularizes the generality of the first clause both with respect to the kinds of propaganda to be investigated ("subversive and un-American propaganda that * * * attacks the principle of the form of government as guaranteed by our Constitution") and the source of such propaganda ("that is instigated from foreign countries or of a domestic origin"). The third clause is obviously ancillary to the first two clauses and does not by implication define a jurisdictional area beyond that expressly marked out by the first two clauses. Thus, no one would seriously argue that the third clause could be construed to read, "all other questions in relation thereto, whether or not they involve propaganda, that would aid Congress in any necessary remedial legislation."

The key jurisdictional term in this resolution is "propaganda."[16] The resolution does not, either disjunctively or conjunctively, link propaganda with some other form of activity. If the subject matter of propaganda were subtracted from the resolution, there would be nothing left. The only "remedial legislation" which the committee is authorized to recommend is legislation relating to propaganda.

Propaganda is, of course, simply another way of describing speech and the dissemination of ideas.[17] The distinction between the communication of ideas and other kinds of activity is not only deeply embedded in our law, but is enshrined in the documents by which we live as a people.

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[16] The basic jurisdiction of every standing committee may similarly be described in a key word or phrase, e.g., "interstate and foreign commerce," "agriculture," "appropriation of the revenue for the support of the Government." Legislative Reorganization Act of 1946, Sec. 121; 60 Stat. 823, 824, 826.

[17] The Court of Appeals for the Second Circuit has defined "propaganda" as a "plan for the publication of a doctrine or system of principles." *Leubuscher* v. *Commissioner*, 54 F. 2d 998, 1000.

The fact that Congress in this extraordinary resolution singled out speech alone for investigation is pregnant with two consequences. First, no gloss, however ingenious, can convert the resolution into one dealing with conduct rather than speech, for to do so would be to attribute to Congress a disregard or ignorance of the most meaningful distinction which our public law has produced. Second, the resolution must conform to the rigorous standards imposed by the First Amendment upon abridgments of free speech.

Whatever judicial conflicts may exist concerning the scope of First Amendment guarantees, no one would contend that we have reached the point when Congress may abridge the dissemination of ideas as such. Yet this resolution does not relate the speech with which it deals to some substantive evil in the area of conduct. The substantive evil is the content of printed matter, utterances and ideas.

In order to exercise jurisdiction the committee must inevitably label and classify those ideas which are "un-American," "subversive" or "attack the principle of the form of government as guaranteed by our Constitution." The resolution thus authorizes the committee officially to brand certain classes or forms of ideas and expression. Such activity by the legislative branch of the government can only serve to censor free speech and political expression, for people are unwilling or afraid to advocate or even to listen to ideas which have been branded as disloyal by the government.

It is apparent that such an extraordinary departure from representative government, as we have known it, would have to be justified—if it could be justified at all—by the most meticulously defined limitations. Instead we find that the scope of this censorship system is virtually limitless.

1. The unlimited scope of the committee's censorship jurisdiction as shown by the terms of the resolution.

The propaganda which the committee is authorized to investigate is propaganda which is "un-American," "subversive" or which "attacks the principle of the form of government as guaranteed by our Constitution." Far from limiting the potential dangers threatened by the resolution, these terms create no meaningful boundaries at all. They are neither terms of art nor have they acquired a specialized or technical meaning or a meaning "by general acceptation." *Schechter Poultry Corporation* v. *United States,* 295 U. S. 495, 552. They are merely forms of political polemic, epithets of opprobrium used to attack the ideas or advocacy which are objectionable to the person who employs them.

The President's Advisory Committee on Universal Training responded to the contention that universal military training is "un-American:"

> "An epithet is not an argument. 'Un-American' means simply that it has not been done before in America. If Americans want it, it becomes American." [18]

In *Fcinglass* v. *Reinecke*, 48 F. Supp. 438, 441, the court pointed out:

> "Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American."

The designation "un-American" implies that there are certain ideas and concepts that are "American." Whatever usefulness such a distinction may have as an appeal to

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[18] *A Program for National Security,* Report of the President's Advisory Committee on Universal Training (1947), 39.

patriotism, it is meaningless as a tool for classifying speech and ideas.[19]

Perhaps the most telling commentary on the difficulty of this term is its use by minority members of the committee to condemn the majority's interpretation of the resolution. Thus in the committee's 1942 report, Congressman Voorhis complained:

> "Once * * * the committee undertakes to accuse people of un-American activities because they criticize certain features of our economy or say unkind things about finance capitalism or because they come out for a greater degree of cooperation in our economic life, it is in danger of becoming an agency which arrogates to itself the right to censor people's ideas. That in itself is un-American." [20]

Like the term "un-American", the term "subversive" is not a term of art, nor does it have an accepted common meaning, but is rather the language of political abuse or opprobrium. This term, which the Court used in quotation marks in *United States* v. *Lovett*, 328 U. S. 303, 308, is probably one of the most question-begging terms yet de-

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[19] In an editorial in the *New York Times* on January 5, 1945, the basic ambiguity of this term was thus commented on:

> "The Special Committee to Investigate Un-American Activities suffered from ambiguity at its birth. Just what is an un-American activity? The law defines crimes against the state, and persons committing such crimes are admittedly un-American. But is it un-American to hold an unpopular opinion * * * or take an attitude that is also held or taken by the Communists? * * * Had he [Dies] pushed his opinion to its logical end more than half the population of the United States might have been denounced * * *. * * * he used methods that old-fashioned persons regard as un-American—indictment by innuendo, refusal of defense testimony, prosecution and sometimes persecution in place of impartial investigation."

[20] 77th Cong., 2d Sess., H. Rept. 2277, Part 2, 4. Compare Congressman Walter's denunciation (*infra*) as "un-American" of the committee chairman's issuance of subpoenas in the White case without consulting committee members.

vised. Nowhere in the resolution is the question answered, subversive of what? [21]

It has been well said that this term is a term of abuse customarily applied to activities "helpful or benevolent to wage earners, persons on relief, or those who are disadvantaged in the struggle for existence." [22]

Since the words "subversive" and "un-American" have no meaning beyond the prejudices of the speaker, we are left only with propaganda which "attacks the principle of the form of government as guaranteed by our Constitution." But this phrase suffers from comparable ambiguity. In *Schneiderman* v. *United States*, 320 U. S. 118, this Court was unable to identify the "principles of the Constitution" and refused to hold that "petitioner is not attached to the Constitution by reason of his possible belief in the creation of some form of world union of Soviet republics" (at 145). The Court suggested that if there is any indispensable principle of the Constitution, it is the guaranty of freedom of thought (at 138, 144), and stated (at 137, 138) that the Constitution itself refutes "the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical changes is necessarily not attached to the Constitution."

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[21] The Committee on Appropriations whose report was considered by the Court in *United States* v. *Lovett, supra*, sought to formulate its own definition of "subversive activity" after conceding that the term had not theretofore been defined by Congress or by the courts. This definition states that, "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." 78th Cong., 1st Sess., H. Rept. 448 (1943) 5.

[22] Emerson and Helfeld, *Loyalty among Government Employees*, 58 Yale L. J. 1, 40 (quoting Attorney General, now Mr. Justice, Jackson).

The Court of Appeals in *Barsky* v. *United States*, 167 F. 2d 241, 245, 246 (C. A. D. C.) cert. denied 334 U. S. 843, thus sought to give precision to this phrase: "The basic concept of the American system, both historically and philosophically, is that government is an instrumentality created by the people, who alone are the original possessors of rights and who alone have the power to create government. * * * The prime function of government, in the American concept, is to preserve and protect the rights of the people." Cf. *Schneiderman* v. *United States*, *supra*, at 181 (Chief Justice Stone's dissenting opinion). But this definition is so broad as to be meaningless.

As Judge Clark pointed out in his dissent in *United States* v. *Josephson*, 165 F. 2d 82, 96 (C. A. 2), cert. denied 333 U. S. 838:

> "And the clause as to attacking the principle of our form of government, as guaranteed by our Constitution, cannot be given any specific content. The freedom of amendment permitted by our Constitution makes possible advocacy of the most extensive changes in our governmental form. It cannot be that the advocacy of amendments urging change in the relation, for example, of the Executive and Congress, the subject recently of several popular books, is subversive."

Individuals and organizations who oppose economic or political reforms seek to recruit "patriotic" values to their cause, by linking an eighteenth century document with eighteenth century economics and theories of governmental power.[23] But as Justice Holmes remarked long ago, "a constitution is not intended to embody a particular economic theory," *Lochner* v. *New York*, 198 U. S. 45, 75; and neither courts nor legislatures are warranted in treating

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[23] Among the guardians of the "principle of the form of government as guaranteed by our Constitution" are the Committee for Constitutional Government (*United States* v. *Rumely*, 345 U. S. 1) and the Constitutional Educational League (*Kamp* v. *United States*, 176 F. 2d 618, cert. denied 339 U. S. 957).

"as unconstitutional what goes against the grain," Frankfurter, J., concurring in *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 547.

The basic obscurity of the resolution is compounded by the assumption that there is some one principle of the Constitution. Judge Edgerton, dissenting in the *Barsky* case, *supra*, at 262, commented on the difficulty of the expression:

> "Does 'the principle of the form of government' here mean the republican or democratic principle only, or does it include e.g. the constitutional duty of courts not to enforce unconstitutional legislation? This court puts a plural where Congress put a singular, and says 'the principles * * * are obvious.' To me it is not obvious how much Congress meant by 'the principle,' or how much the court means by 'the principles,' or that the two meanings are identical. Both because 'the principle' is vague and because 'attacks' is vague, I do not know whether propaganda 'attacks the principle' if, e.g., it advocates a constitutional amendment replacing the American principle of judicial review by the British principle of legislative supremacy."

The clearest "principle of the form of government as guaranteed by our Constitution" is freedom of thought and of political affiliation and expression; "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate," *United States* v. *Schwimmer*, 279 U. S. 644, 654, 655. As one of our most eminent historians has written:[24]

> "True loyalty may require, in fact, what appears to the naive to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the 'Higher Law' were lacking in patriotism.

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[24] Commager, "Who is Loyal to America?" in *Primer of Intellectural Freedom* (1949), edited by Howard Mumford Jones, 30.

> We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present. 'We are a rebellious nation,' said Theodore Parker, known in his day as the Great American Preacher, and went on: 'Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.'" [25]

Surely there is nothing more truly "un-American" or more hostile to the "principle of the form of government as guaranteed by our Constitution" than the attempt by a governmental body to compel conformity. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642. See, also, Jackson, J., concurring in *Thomas* v. *Collins*, 323 U. S. 516, 545.

An eloquent commentary on the content of the phrase "the form of government as guaranteed by our Constitution" is found in its interpretation by the committee's former counsel in the following letter: [26]

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[25] Compare the concurring opinion of Justice Jackson in *American Communications Association* v. *Douds*, 339 U. S. 382, 440, footnote 12.

[26] 92 C. R. A701 (1946).

HOUSE OF REPRESENTATIVES
COMMITTEE ON UN-AMERICAN ACTIVITIES

Washington, January 29, 1946

VETERANS AGAINST DISCRIMINATION
NEW YORK, N. Y.

GENTLEMEN:

Would you please be good enough to send me a list of your officers and your managing committee?

Several of your circulars have been sent to us by citizens of your city, and I note that you refer to democracy several times. I wonder if you are sufficiently familiar with the history of the United States to be aware that this country was not organized as a democracy, and that Section 4 of Article IV of the Constitution reads, in part, as follows: "The United States shall guarantee to every State in this Union a republican form of government."

Is it your purpose to ask for an amendment of the Constitution or do you propose to conduct a propaganda campaign against the administration of the provisions of the Constitution?

Yours very truly,

ERNIE ADAMSON
Chief Counsel

2. The legislative background and committee interpretation of the terms of the resolution confirm its unconstitutional scope.

The legislative background of the term "un-American" in no way serves to sharpen its meaning. Thus, when the House passed Resolution 282 in 1938, members unsuccessfully demanded the insertion of controlling or limiting standards with respect to the meaning of the term "un-American":

> "Mr. Patrick. It seems to me the most important thing involved in this matter is what is an un-American and what is an American activity? Who is to pass on that question?

"Some things have been mentioned that perhaps we would concede to be un-American. But what is un-Americanism?

"* * * what will determine when anything is un-American so that we can put a finger on it and say that is it?

"Mr. Taylor. The Congress will finally prescribe that.

* * * * * *

"Mr. Maverick. Nobody knows what is un-American. I ask you what is un-American?

"Mr. Knutson. The goose-step." [27]

In 1940, during the debate on the re-enactment of the basic resolution (86 C. R. 570-604), the members of the committee expressed conflicting views on the meaning of the term "un-American." [28]

The extreme latitude of the House committee's resolution prompted a minority member, Congressman Voorhis, to complain in a minority report in 1942:

"All the minority is contending for is the right of loyal American citizens to disagree politically with the majority of the Dies committee without being branded as subversive and un-American." [29]

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[27] 83 C. R. 7572, 7576 (1938). In the course of a debate on a prior resolution along similar lines the proponents refused to indicate its meaning when Representative Johnson asked:

"What I would like to find out is what is un-American." H. Res. 88, 75th Cong., 1st Sess., 81 C. R. 3286 (1937).

In answer to a prior similar question, the member in charge of the resolution stated:

"The committee may read this resolution and put whatever interpretation they see fit upon it without any limitation so far as I am concerned" (81 C. R. 3285).

The resolution failed to pass.

[28] One member of the committee defined un-American activities as "organizations and groups * * * which are directed, controlled and subsidized by foreign agencies or governments" (86 C. R. 576).

[29] 77th Cong., 2d Sess., H. Rept. 2277, Part 2 (1942), 7.

The lack of meaning of the term "subversive" was complained of by Representative Outland in 1943:

> "Just what are subversive activities? Who is to be the judge? There have been people who have called the chairman of the committee subversive, which in my opinion is entirely incorrect. But the permitting of individual interpretation of just what is deemed subversive is a dangerous and un-American thing." [30]

This question was asked after almost five years of investigation and committee reports. No answer to it is recorded.

In 1945, seven years after its creation, the committee found it necessary to farm out the resolution to the Brookings Institution for interpretation.[31]

In recent years, the committee has not troubled itself with attempting to define or justify the scope of its authority.[32] In one of its early reports, however, the committee made an attempt to comment on the meaning of the term "un-American." The committee emphasized that "Americanism recognizes the existence of a God and the all important fact that the fundamental rights of man are derived from God and not from any other source." This report suggests that the following *inter alia* are Communist and therefore un-American: "absolute social and racial equality"; "the destruction of private property and the abolition of inheritance," apparently irrespective of the means employed or advocated; "the substitution of communal ownership of property for private ownership"; belief that it is "the duty of government to support the people"; "a system of political, economic, or social regimentation based upon a planned economy"; "collectivistic

[30] 89 C. R. 806 (1943).

[31] *Suggested Standards For Determining Un-American Activities*, The Brookings Institution (Washington, 1945).

[32] For some informal efforts by a committee member to defend its jurisdiction, see *infra*, note 305.

philosophy"; and "the destruction of the American system of checks and balances with its three independent coordinate branches of government." [33]

In its 1940 report, the committee set forth the following definition of "un-American":

> "By un-American activities we mean organizations or groups existing in the United States which are directed, controlled or subsidized by foreign governments or agencies and which seek to change the policies and form of government of the United States in accordance with the wishes of such foreign governments." [34]

On July 18, 1946, the chief counsel of the committee wrote Congressman Doyle: "The committee has adopted no definition of subversive or un-American activities." [35] Mr. Doyle commented:

> "Ever since I became a member of this Seventy-ninth Congress, I have sought to ascertain by what definition of 'subversive activity' or 'un-American activity' a person was to be measured as either a loyal or disloyal American citizen. No one seemed to find any high court definition used by the House Committee nor could I find any printed or any announced definition which the committee had to either guide or limit its activities.
>
> * * * * * *
>
> "This illustrates that there can be at present as many definitions of 'subversive and un-American' as there are committee members. In fact, I think I notice that there is some sharp difference of opinion expressed by committee members on this point." [36]

[33] 76th Cong., 1st Sess., H. Rept. 2, (1939), 10, 12. We discuss, *infra*, the application by the committee of these standards to various ideas, causes and political activities.

[34] 76th Cong., 3d Sess., H. Rept. 1476 (1940), 2.

[35] 92 C. R. A4743 (1946).

[36] *Ibid.*

The Court thus has under review a resolution which authorizes an investigation of the content of ideas, the scope of which is neither defined nor definable. The limitless scope of the resolution explains why the committee's operations are, as we will show, governed by partisanship, prejudice and the subjective whims of particular committee members. The committee itself recognizes no limitations at all on the permissible range of its activities. Thus, when Representative Wood was chairman of the committee he stated at one of its hearings, "The committee is empowered to investigate any activities of any organization or any individual. The committee conceives it to be within its scope to investigate the activities of any organization that expounds American [sic] principles of government." [37]

In the same vein are the recent statements of Representative Jackson:

> "I regard anything as a proper subject for investigation and interrogation by this committee which has affiliated with it a considerable number of individuals who are either themselves members of the Communist Party or who have for many years followed the Communist Party line.
>
> * * * * * *
>
> "Is there any phase of life in this country which is not subject to the propaganda activities of the Communist Party?" [38]

And so it was from the very beginning.

B. The committee's consistent interpretation of the resolution establishes its unconstitutionality.

The resolution is not an abstract exercise in political theory. It is a guide to the subject matter which the committee may investigate, to the scope of its compulsory

[37] *Communist Party* (1945) 31.

[38] 3 *Los Angeles Area* (1953) 619, 645.

process and to the extent of its power to cause witnesses to be punished for contempt. The content and meaning of the resolution are best gleaned from the activities of the committee.

The lack of limitation on the scope of the resolution is nowhere better seen than in the catalogue of ideas, utterances and causes which it has designated as "subversive" or "un-American." Thus, Congressman Thomas, subsequently chairman of the committee, interrogated J. B. Matthews as follows during the first committee hearings: [39]

> "Mr. Thomas. The second question is: Are not many of the acts now being advocated or now being enacted by the Government of the United States similar to the steps which led to dictators in Soviet Russia, Germany and Italy?
>
> "Mr. Matthews. Well, now, Mr. Chairman, that is calling for a pure conclusion.
>
> "Mr. Starnes (presiding). I think so. This committee is not concerned in the least in partisanship.
>
> "Mr. Thomas. This is not partisanship. This is un-American activity."

Asked to name names and specific acts, Mr. Thomas mentioned "the Supreme Court packing bill and the reorganization bill."

The committee has brought within the orbit of "un-American," criticism of itself, of individual members of Congress, of the FBI, and espousal of the New Deal legislative program.[40] One organization, for example, was

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[39] 1 *Investigation*, 915, 916.

[40] Ogden, *op. cit.*, 236-237; *New York Times*, Feb. 23, 1941; 3 *Motion Picture Industry* (1951) 669; 77th Cong., 2d Sess., H. Rept. 2277 (1942), 2; 2 *Communism in the Government* (1950) 2959-2985, testimony of Max Lowenthal (the subpoenaing of Lowenthal in these hearings was considered an attempt to discredit an individual solely because he had written a work critical of the FBI, see Carr, *op. cit.*, 202-203); 3 *Investigation* 2199; 4 *Infiltration—Education* (1953) 1088-1089.

cited as a Communist front because it formulated and circulated a petition to discontinue the Die Committee.[41] Attacks on the committee have been characterized by it as "inspired by a subversive element in this country and carried out by their fellow travelers * * *."[42]

Indications of "subversiveness" include belief in the extension of universal suffrage and the raising of wages and the standard of living;[43] signing a letter in behalf of Harry Bridges and speaking favorably of sit-down strikes;[44] advocacy of anti-poll tax legislation, activity on behalf of the Scottsboro defendants and support of the Morgenthau plan for Germany;[45] and criticism of McCarran-Walter Immigration Act.[46]

The committee has applied the resolution in these and similar ways to government agencies, labor unions, religious groups, scientists, the motion picture industry, writers, lawyers, teachers, doctors, the C. I. O. Political Action Committee, radio commentators, minority groups, farm groups, professional groups, veterans groups, youth groups, and the foreign born. Its regional investigations, cutting across occupational lines, cover the District of Columbia, Hawaii, Western Pennsylvania, Philadelphia,

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[41] *Citations by Official Government or State or Municipal Agencies or Reliable Private Organizations Regarding the Character of Organizations Named* (1946).

[42] *Gerald L. K. Smith* (1946) 3.

[43] 3 *Investigation (Exec.)* 1299-1300.

[44] 78th Cong. 2d Sess., H. Rept. 1311, *Report on the C.I.O. Political Action Committee* (1944), 82.

[45] 80th Cong. 1st Sess., H. Rept. 592, *Report on the Southern Conference for Human Welfare* (1947), 4, 10.

[46] *G. Bromley Oxnam*, 116-117.

Cincinnati, Columbus, New York, Albany, Detroit, Chicago, Hollywood, Los Angeles, Baltimore and Massachusetts.[47]

C. The resolution violates the First Amendment.

Unless we have crossed a meridian of time in which the landmark decisions of the Court on the subject of the First Amendment have lost their meaning the resolution cannot stand.

The resolution takes as its target the advocacy and circulation of ideas. But the First Amendment forbids legislation which abridges, burdens, restricts or punishes the advocacy of ideas through the exercise of press, speech or assembly where such advocacy is not part of an attempt to bring about a substantive evil.[48]

The resolution on its face and as it has been consistently construed abridges the kind of speech, public discussion and political expression, which it is the essential purpose of the First Amendment to protect from congressional invasion. It is upon the unimpaired exercise of these rights that popular self-government depends. *DeJonge* v. *Oregon*, 299 U. S. 353; *Whitney* v. *California*, 274 U. S. 357, 375,

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[47] *Index V, Cumulative Index to Publications of the Committee on Un-American Activities*, 1-9, and committee publications for 1953. Some of the geographical areas have been covered several times; e.g., Hollywood: *Motion Picture Industry* (1947) and *Motion Picture Industry* (1951-2); Los Angeles: *Los Angeles Professional Groups* (1952-3) and *Los Angeles Area* (1952-3); Washington, D. C.: 1 *District of Columbia Area* (1949) and 2 *District of Columbia Area* (1950); New York: *New York City Area* (1953) and *Infiltration—Education* (1953).

[48] For example, *Terminiello* v. *City of Chicago*, 337 U. S. 1; *Thomas* v. *Collins*, 323 U. S. 516; *Schneiderman* v. *United States*, 320 U. S. 118; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147; *Herndon* v. *Lowry*, 301 U. S. 242; *Gitlow* v. *New York*, 268 U. S. 652, 672; *Pierce* v. *United States*, 252 U. S. 239, 253; *Schaefer* v. *United States*, 251 U. S. 466, 482; *Abrams* v. *United States*, 250 U. S. 616, 630; *Schenck* v. *United States*, 249 U. S. 47.

and *Gilbert* v. *Minnesota*, 254 U. S. 325, 338 (Brandeis, J., dissenting). The interest which the resolution invades is not merely that of the individual to speak and to agitate, but the right of the people to hear and judge for themselves.

From what has been said with respect to the indefiniteness of the resolution it seems incontrovertible that even if the resolution might conceivably be applied constitutionally, it must be invalidated. As the Court has frequently held, a statute which is so vague and indefinite as to permit within its scope the invasion of the guaranties of free speech, press and assembly, violates the First Amendment. In *Winters* v. *New York*, 333 U. S. 507, 509-510, the Court said:

> "The appellant contends that the subsection violates the right of free speech and press because it is vague and indefinite. It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment. Stromberg v. People of State of California, 283 U. S. 359, 369; Herndon v. Lowry, 301 U. S. 242, 258. A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech or press."

Vagueness in this area is more objectionable than it is in ordinary criminal statutes because a vague statute curtailing the exercise of civil rights exerts an intimidating effect on speech generally and permits discriminatory application.

The resolution is not only hopelessly vague, but it would be difficult to find a more glaring example of over-regulation. The Court has repeatedly insisted that a statute which invades basic rights can avoid a clash with the

Constitution only if it is narrowly drawn to deal with the precise evil which the legislature is seeking to curb. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *DeJonge* v. *Oregon, supra.*

We frankly do not know and find it fruitless to speculate concerning the nature of the substantive evil to which the resolution is addressed. We cannot conceive how it could be something other than the evil of ideas. However, even assuming that there are certain limited classifications of ideas which Congress could censor through the investigation process, the fact remains that it has drawn a resolution which authorizes an extraordinary roving inquisition into all manner of opinions, beliefs, ideas and speech. The threat which is posed by the resolution is not abstract or hypothetical: it is concretely established by the interpretations of the committee. Surely the Court must agree that the number of innocent victims of the resolution is far more impressive than any legitimate goal which could be speculatively ascribed to the resolution. One has but to glance at the remarkable range and consistency of the committee's censorship activities to recognize that more compelling considerations than have ever before moved the Court to invalidate legislation on its face are present here. Compare *Thornhill* v. *Alabama*, 310 U. S. 88; *Winters* v. *New York, supra; Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 310 U. S. 242, 258.

In none of the above-cited cases did the statute authorize or make possible the far-reaching abridgments of constitutionally protected rights which this resolution authorizes. In none of them was there presented the same combination of vagueness and extreme over-regulation. Professor Paul A. Freund has written:

> "The problem of an overbroad statute, whether in the field of civil liberties or elsewhere, is really a special case of the problem of vagueness. A statute which is vague and indefinite—which prohibits, for example, 'unreasonable prices'—is of course insupportable unless

> what is indefinite is made definite in advance by authoritative construction. Essentially the same vice inheres in a statute that is overbroad. The terms themselves are not vague; a ban on all picketing is superficially precise. Yet the clarity of its language is delusive, since it will have to be recast in order to separate the constitutional from the unconstitutional applications. If it is read as applicable only where constitutionally so, the reading uncovers the vagueness which is latent in its terms.
>
> "* * * The public interest in freedom of expression may serve to invalidate an overbroad statute that casts a cloud on expression both within and without the constitutional boundary.
>
> "Can an overbroad statute be saved by construction? If the limiting construction is a relatively simple and natural one it can probably be made to save the statute." [49]

Certainly a limiting construction of the resolution would not be "a relatively simple and natural one." As we have stated, the resolution is unconstitutional at its core. Moreover, to construe the resolution as authorizing only constitutional inquiries would be to ignore the background of the resolution, its language, as well as the committee's operations and activities under it for the past fifteen years. Nor does the resolution contain any standards which could be used in narrowing its scope.

The government may seek support for the resolution in the contention that the time has come when public discussion of dangerous or controversial doctrines must be suppressed or investigated. But the convenient *mystique* of security cannot change the fact that the First Amendment would be meaningless if the government had power to decide that people could not be trusted to choose for themselves. In this democracy "freedom to differ is not limited to things that do not matter much." *West Virginia Board of Educa-*

[49] *The Supreme Court and Civil Liberties*, 4 Vanderbilt L. Rev. 533, 540 (1951).

tion v. *Barnette*, 319 U. S. 624, 642. See also *Whitney* v. *California*, 274 U. S. 357, 377.

Another theory upon which the government might conceivably rely in support of the resolution is that "un-American" and "subversive" propaganda may be treated as per se punishable in the same manner as slander or obscenity. Such a view, we are confident, would not be seriously entertained by the Court, for to accept it would fatally compromise the principles which identify and distinguish our political system.

Nor will it do to urge that the resolution is safe from condemnation on its face by the fact that speech is only "investigated" and not punished or prohibited. As we have suggested, the committee is not engaged in the abstract cataloguing of ideas. Under the committee's terms of reference, it must at a very minimum label ideas and doctrines as dangerous and false, and no standard limits the committee beyond its subjective prejudice and personal interest.[50] This is a serious form of censorship. As Judge Edgerton put it in his dissent in *Barsky* v. *United States*, 167 F. 2d 241, 255:

> "That the committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it."

Indeed, the committee's investigations have produced a powerful deterrent effect on all freedom of discussion.

> "The effect is not limited to the people whom the committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the committee has made in the American

[50] As we shall show in the next point of this brief, the committee implements the resolution through a novel system of mass persecution which it calls "exposure."

> sense of freedom to think. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure" (*ibid.*).

Two cases which have sustained the resolution have relied heavily upon the view that the First Amendment does not limit the power of inquiry. *Barsky* v. *United States*, *supra*, at 246, but compare 250; *United States* v. *Josephson*, supra, at 88, 89.[51]

The *Rumely* case, 345 U. S. 41, establishes the error of this view, as it does of the notion also expressed in both cases, that the possibility of production of valid legislation by the committee is sufficient to justify the constitutionality of the resolution. There need only be added here that the First Amendment limits *all* powers of Congress, that the authority of the committee is based on a statute which is obviously subject to the same constitutional limitations as every other congressional act.[52]

Surely it is irrational to attribute an immunity from the First Amendment to an implied power, the investigative power, which the expressly delegated powers do not enjoy. And the notion that the constitutionality of the exercise of the power of inquiry is measured by the existence of a possibility that valid legislation will emerge from the inquiry is particularly unfortunate when applied to this resolution. Congress intended that the primary function of the committee be investigative; indeed it is the only

[51] See also to the same effect *Morford* v. *United States*, 176 F. 2d 54, reversed on other grounds 339 U. S. 258; *Marshall* v. *United States*, 176 F. 2d 473, cert. denied 339 U. S. 933; *Lawson* v. *United States*, 176 F. 2d 49, cert. denied 339 U. S. 934; *Eisler* v. *United States*, 170 F. 2d 273, cert. granted 335 U. S. 857, removed from the docket 338 U. S. 189.

[52] Compare *Jones* v. *Opelika*, 316 U. S. 584, 609 (dissent, adopted as majority view in 319 U. S. 103).

permanent committee which enjoys a purely investigative jurisdiction. Since the committee's legislative output is so meager and its investigative activity so prodigious, the test of ultimate legislation would immunize for all time from constitutional redress the most outrageous assaults upon the liberties of the people. The *Barsky* and *Josephson* decisions have needlessly complicated the matter. Since the uniquely distinguishing characteristic of the functioning of the committee is the exercise of the power of inquiry for purposes of investigation rather than legislation, the congressional act authorizing the exercise of that power must conform to the First Amendment, rather than the legislation which it is not its primary function to produce. The Constitution does not tolerate such evasions.

POINT II

The pattern of the committee's functioning since its creation establishes the unconstitutionality of the resolution.

In the previous point of this brief we demonstrated that the bare terms of the resolution and the manner in which the committee has interpreted those terms are in irreconcilable conflict with the First Amendment.

The contentions already presented, we submit, give the Court no alternative but to set aside the resolution. However, the Court is not, in its evaluation of the committee and the resolution, remitted to the bare language of the resolution or to a formal gloss on its terms. The committee has been in existence for some fifteen years. During th[illegible] period of time, it has built a mountain of hearings, produced numerous reports and carried on intensive investigative activities.

The constitutionality of the committee may therefore be tested not merely by the language of the resolution, as on a

motion to dismiss, but also on the basis of an analysis of the lengthy record which the committee has made, fully documenting its view of its powers, its conception of its objectives, the methods of its operation and its role in our scheme of government. A study of this record confirms in detail what has already been said with respect to the vagueness and range of the resolution. In addition, it brings into focus the following constitutionally significant perspectives:

> *The committee does not investigate, as that term is limited and defined by the Constitution and the decisions of this Court. It conducts a form of ideological warfare against people and associations. The outstanding characteristic of its activities is a system of exposure which is a program of mass persecution of individuals and organizations because of their political views and affiliations.*
>
> *The exposure formula contemplates a deliberate destruction of the personal and private rights and interests of the witnesses called before the committee.*
>
> *The resolution as the committee has consistently applied it authorizes a sharp abridgment of the right to association and to engage in concerted activity, protected by the First Amendment.*
>
> *The committee has used the investigative power to convert itself into a new kind of tribunal which is not authorized by our constitutional system.*

A. The committee as an instrumentality for attacking individuals.

The censorship system only begins with stigmatizing the idea, cause, movement or organization. The committee discovered rather early in its functioning that attacks upon individuals serve its censorship purposes far more effectively than attacks upon the content of ideas. The

committee's attack upon individuals is not incidental to some other objective. It does not, and is not intended to, serve some ultimate legislative purpose. Nor is it a means of identifying the sources of propaganda—it is an end in itself.

1. The exposure system.

What emerges from the committee's functioning over the past fifteen years as the characteristic end product is not an analysis of propaganda, but an attack upon people—thousands of them. The term which best describes this aspect of the committee's functioning is "exposure"; indeed this is the term most commonly used by the committee itself. It is the purpose and function of the committee to prejudice an individual as much as possible and then to leave him so situated that the strongest possible sanctions may be used against him. The "public opinion" which the committee relies on as its principal weapon is really the stimulation of economic sanctions, social ostracism, violence and other forms of persecution. A person exposed by the committee may lose his job, his professional career may be destroyed, his social and family relationships ruined and his reputation injured beyond repair. He may find himself subject, as the result of the committee's pressure, to criminal prosecution and deportation proceedings.

It would be naive to suppose that the committee regards the injuries resulting from its exposures as an unfortunate or regrettable aspect of its functioning. The use of the exposure device as a means of causing prejudice to the person is freely admitted throughout the history of the committee.[53]

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[53] (a) Statement of Congressman Dies, first chairman of the committee, on the floor of the House when the committee was first created:

"I am not in a position to say whether we can legislate effectively in reference to this matter, but I do know that ex-

(Footnote Continued on Page 58)

The chairman of the subcommittee who presided over e hearing in this case repeatedly referred to the committee's "exposure" functions. His response to petitioner's

(Footnote Continued from Page 57)

posure in a democracy of subversive activities is the most effective weapon that we have in our possession. Always we must keep in mind that in any legislative attempt to prevent un-American activities, we might jeopardize fundamental rights far more important than the objective we seek, but when these activities are exposed, when the light of day is brought to bear upon them, we can trust public sentiment in this country to do the rest." 83 C. R. 7570 (1938).

(b) 1939 committee report.

"While Congress does not have the power to deny to citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to focus the spotlight of publicity upon their activities * * *." 76th Cong., 1st Sess., H. Rept. 2, 13.

(c) 1940 committee report

"One method which can and should from time to time be used is the method of investigation to inform the American people of the activities of any such [subversive] organizations in their nation. This is the real purpose of the House Committee to Investigate un-American Activities." 76th Cong., 3d Sess., H. Rept. 1476, 1, 2.

"The purpose of this committee is the task of protecting our constitutional democracy by turning the light of pitiless publicity on the activities of organizations seeking to work the will of foreign dictators in the United States or to destroy our constitutional democracy and set up a totalitarian regime * * *." *Ibid.* 24.

(d) 1941 committee report.

"It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo.

* * * * * *

"This committee is the only agency of government that has the power of exposure. No other agency can require witnesses to appear before it and testify under oath with respect to un-American activities and subversive propaganda. No other agency of government has the power to subpoena records and

(Footnote Continued on Page 59)

very first protest against the disclosures demanded of him was the statement that the exposure purpose justified them.

(Footnote Continued from Page 58)

documents of un-American organizations, and individuals, except under unusual circumstances. There are many phases of un-American activities that cannot be reached by legislation or administrative action." 77th Cong., 1st Sess., H. Rept. 1, 23, 24.

(e) In 1943, the committee, reporting that "discovery and exposure" were its "special function" by mandate from the House, published the names, positions and salaries of 563 government employees as members of the American League for Peace and Democracy. "* * * the committee felt that the Congress and the people were entitled to know who they were." 77th Cong., 2d Sess., H. Rept. 2748, 2, 4, 5.

(f) 1947 committee report.

"The Federal Bureau of Investigation is able to detect and apprehend criminal acts of un-Americanism; the House Committee on Un-American Activities is empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future." 79th Cong., 2d Sess., H. Rept. 2742, 16.

(g) Statement by Representative Thomas.

J. Parnell Thomas, when chairman of the committee, said in a radio address:

"The chief function of the committee * * * has always been the exposure of un-American individuals and their un-American activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government, once such efforts have been pointed out. The Congress' right to investigate and expose undemocratic forces is as established and untrammeled as our Constitution." 93 C. R. A4277 (1947).

(h) Statements by Representative Rankin.

Mr. Rankin, a leading member of the committee, said in 1945:

"I serve notice on the un-American elements in this country now that this 'grand jury' will be in session to investigate un-American activities at all times." 91 C. R. 275 (1945).

"Mr. Rankin has said, in the present record, that the committee is a 'grand jury' to which 'defense counsel' should not

(Footnote Continued on Page 60)

And thereafter all petitioner's basic objections to the committee's inquisition were met by this same exposure justification (*supra*, p. 7).

2. The committee's exposure dossiers.

To fully comprehend the frightening numbers of persons affected by the committee's activities, one need only examine its proudly discussed "file and reference service." The committee understates the facts when it says that these "should not be thought of as files in the ordinary sense" [54] for indeed they are not. They are a "constantly growing" accumulation of information on individuals and organizations open to designated representatives of the executive branch and given out on request to members of Congress and private individuals. The committee boasts that

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(Footnote Continued from Page 59)

be admitted" (Judge Edgerton in *Barsky* v. *United States*, *supra*, at footnote 19).

(i) Statement by Representative Mundt.

"Our task—to which you members of this House assigned us—is to seek out and to expose those activities which although legal are nonetheless un-American, subversive, and contrary to the American concept.

* * * * * * *

"May I interpolate here, Mr. Speaker, to remind the House that in voting favorably as it did on the contempt citations which our committee has brought before you that you stand foursquare with that great constitutional lawyer, Mr. [John W.] Davis, who recommends that the spotlight of publicity be turned on organizations suspected of subversive activities." 92 C. R. 5217 (1946).

(j) Statement of Representatives Mundt and Nixon.

"If this committee is not to operate entirely in secret, it cannot avoid making headlines unless it avoids activities in fulfillment of its mandate from Congress to help disclose and curb un-American activities." "Mundt-Nixon Proposals" (for reform of committee procedure) of Dec. 27, 1948, in *New York Herald Tribune*, Dec. 28, 1948, 19.

[54] *Annual Report* 1952, 77.

> "The reference service furnished during this year [1952] has shown a steady increase, reflecting a greater growth in the amount of information requested and furnished than in the actual separate requests made."[55]

The growth of the committee's file service is reflected in its own figures. By the end of 1948, the committee had compiled reports on 25,591 persons and 1,768 organizations at the request of members of Congress. There were 300,000 card references to activities and affiliations of individuals. There were separate files maintained on the activities of 3,040 persons, "top leaders" and "prominent fellow travelers" of the Communist Party. There were lists of signers of Communist Party nominating petitions in twenty states for various years, with 363,119 signatures. "Since subversive forces try to infiltrate other organizations * * * the committee has acquired a vast store of information concerning thousands of organizations in the United States"—so huge is the number that the committee tells us only that there are 380 organizations filed under the letter "A". The reports of the investigators referred to 15,825 organizations. During 1947 and 1948 representatives of various government agencies made 5,975 visits to committee file rooms.[56]

In 1949 the committee reported that it had accumulated more than a million documents and records. The card references to activities and affiliations of individuals were increased to 470,000. During 1949, liaison agents from government agencies made 3,956 visits to the files section.[57]

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[55] *Ibid., 77-78.* The files on Bishop Oxnam, for example, were released to leaders of his church. *G. Bromley Oxnam,* 111. The committee files on Professor Burgum were lent to New York University for use by the university in its dismissal proceedings against him. See *Matter of Hearings on Charges Against Associate Professor Edwin B. Burgum before Senate Faculty Committee,* New York University (1953), 118-119.

[56] *Report,* Dec. 31, 1948, 21-24.

[57] *Annual Report,* 1949, 18-21.

During 1950, more than 300,000 pieces of new material were added to the committee's "collection." The card references increased to over half a million. Individual files on some 4,000 "leaders" of various organizations were maintained. Executive branch agents made 3,600 visits to the committee's files section, checking for information concerning more than half a million persons. Staff members answered 2,600 requests made by members of Congress for information on 5,167 individuals and 1,917 organizations.[58]

In 1951, there were over 6,300 visits by government agents who checked an estimated three-quarters of a million names through the committee's files.[59]

By the end of 1952, the committee reported over 3,600 inquiries involving 9,500 individuals and 2,000 organizations. Members of Congress received 1,440 written reports totalling over 10,000 pages and about 1,000 verbal replies. Government agents made 6,260 visits and checked the names of 840,000 individuals through the committee records.[60]

Although the committee gives no information in its reports concerning the extent of the data furnished to private non-governmental inquirers, it should be borne in mind that an opportunity for indirect private inquiry exists through

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[58] *Annual Report*, 1950, 40-43. It has been charged by Committee Member Voorhis that "It has become a practice in the House for members to call up the Dies committee and ask for a report on this or that individual against whom they desire to speak." 88 C. R. A725 (1942).

[59] *Annual Report*, 1951, 24-26.

[60] *Annual Report*, 1952, 77-79.

members of Congress, who have easy access to information contained in the files.[61]

The scale of the accumulation and publication of names in the recent work of the committee is best demonstrated in its last two annual reports. During 1951, the committee report for that year boasts, "hearings disclosed the positive identification of more individuals as members of the Communist Party than during any preceding year in the history of the committee." [62]

The 1952 report reveals how intensely the committee is now pursuing individuals. Out of 89 pages in this report, the committee has devoted approximately 54 pages, or about 60 percent, to listing the names of individuals named as Communists before the committee during the year, together with the names of the informants who so designated them.[63] This then was the most significant achievement of the committee in the year 1952. We leave to the ingenuity of the government to discover some legislative purpose in the establishment of this vast political identification system and to find an explanation of how it differs from the political dossiers of totalitarian regimes. In the ordinary citizen it inevitably creates the fear that his views and associations are under constant scrutiny from Washington and may be entered in a card index or file folder. If the committee's files continue to grow at their present pace,

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[61] When criticized by one of its witnesses for releasing unevaluated evidence from its files, the committee justification, stated by the chairman, was:

> "* * * you indicated that you didn't know about your being listed on letterheads of certain organizations until you learned through our files that you were listed. I feel you, as a good American citizen, should appreciate the fact that our committee made this knowledge about you available." *G. Bromley Oxnam*, 122.

[62] *Annual Report*, 1951, 6.

[63] *Annual Report*, 1952, 12-27, 29-34, 36-39, 41-56, 58-67, 68-69, 70-73.

it will require only a few decades to have the entire nation dossiered. Instead of the telescreen of Big Brother in Orwell's *1984*, we shall have the "file and reference service" in every home.

3. The committee as inquisitor into political affiliation and private association.

It is standard committee practice and a keystone of the exposure system to ask witnesses under oath and threat of contempt sanctions what their political views are and whether or not they are members of named political and other organizations. The committee begins, but does not end, with questions concerning Communist Party membership. In this case, for example, petitioner was asked questions not only concerning Communist Party membership, but membership in other organizations as well. *Supra*, pp. 6-7. It must be remembered that the committee views itself as having been "empowered to explore and expose activities by un-American individuals and organizations which, while sometimes being legal, are nonetheless inimical to our American concepts and our American future."[64] The committee is "concerned with activities that aid and abet Communist movements and with people who assist Communist movements, wittingly or unwittingly."[65]

In addressing one witness, the committee asserted:

> "The committee considers the Communist Party of the United States to be a subversive organization, and the testimony or activities of any individual connected with the Communist Party of the United States is considered to be the purview of this committee's authority.
>
> "There has been considerable testimony before the Special Committee on Un-American Activities, and this committee, its successor, which link you with the activities of the Communist Party.

[64] 79th Cong., 2d Sess., H. Rept. 2742 (1947), 16.

[65] *G. Bromley Oxnam*, 121.

"The questions which will be asked you this morning will be aimed at determining the facts, and it is therefore requested that your answers be responsive and direct." [66]

Another witness was told: "The chief purpose of your testifying before this committee is due to the fact that it had information you were a Communist," and "That is the reason you are here before this committee." [67]

In the motion picture industry hearings in 1947, ten witnesses, called because they were suspected of being Communists, refused to answer the questions concerning membership in the Communist Party and were summarily dismissed. Immediately after a witness was removed from the stand, the committee resorted to a technique which had clearly been planned for just the occasion, and which revealed its true purpose in requesting the attendance of the witnesses. The committee called to the stand one of its own investigators and read into the record a detailed dossier which it had assembled on the previous witness, tending to prove the affiliation of such witness with the Communist Party.[68]

This purpose was also illustrated when, in response to a protest against the question by one of the witnesses, the committee declared: "Mr. Lawson, the most pertinent question that we can ask is whether or not you have ever been a member of the Communist Party. Now, do you care to answer that question?" When the witness again refused to answer that question, the committee retorted, "We are going to get the answer to that question if we have to stay here for a week." [69]

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[66] *Gerhart Eisler* (1947), 2.

[67] 1 *Investigation* (*Exec.*), 86-87.

[68] *Motion Picture Industry* (1947), 296-304, 334-342, 370-382, 388-393, 405-411, 415-418, 462-464, 468, 483-486, 489-491.

[69] *Ibid.*, 294.

A similar pattern was apparent in the hearings conducted in Detroit. Many witnesses were subpoenaed to appear for the single purpose of testifying as to their suspected or alleged membership in the Communist Party. When these witnesses refused to disclose whether or not they were or had been members of the Communist Party they were summarily dismissed.[70]

One such witness was excused even though he admitted having once been a member of the Communist Party.[71] The committee's primary interest in establishing an individual's past or present membership in the Communist Party is further illustrated by its statement to one witness, who after being admonished not to make speeches charged that a friendly witness had been allowed to speak extensively that very morning: "If you will admit you are a Communist, I will sit here until midnight and listen to you." Chairman Wood immediately volunteered, "So will I, or if you will deny you are a Communist, I will do the same thing."[72]

The committee conducts extensive inquisitions into the witness' association with an almost endless variety of organizations in order to expose him as a "subversive." In this respect its hearings proceed along two parallel lines: it seeks to establish, on the one hand the individual's associations with particular organizations and, on the other, that these organizations are subversive.[73]

Sometimes the committee finds it necessary to conduct a general inquisition into a witness' organizational ties.

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[70] 2 *Detroit Area* (1952), 3091, 3092, 3095, 3096, 3099, 3102, 3105, 3107.

[71] *Ibid.*, 3094.

[72] *Ibid.*, 3109-3110; see also 3098.

[73] A fair sample of this technique is the hearing of Bishop Oxnam. See also, for example, 4 *Investigation (Exec.)*, 1751-1753. There are few hearings in which it is not employed. We deal below with the role of the "subversive" organization in the committee's operations.

Thus, one witness was asked by Congressman Thomas: "* * * will you tell the committee the names of all the organizations that you had been a member of? I mean all kinds of organizations, every kind of organization you can think of?" When Congressman Rankin inquired whether the question referred to "fraternal organizations," Mr. Thomas replied: "I mean every kind of organizations. I don't care what it is."[74] One witness was subjected to a series of such questions: "Are you a member of the Elks' Club?" "Are you a member of the B'nai B'rith Lodge?" Are you a member of any of the Masonic fraternities?" Are you a member of any of the lodges identified with any religious organization in this country?" "Are you a member of any of the established automobile clubs in this country, such as the A. A. A.?"[75] Another witness was asked, "Did you ever belong to the Elks?" "Did you ever belong to the Knights of Columbus?"[76] Still another witness was asked, "Are you a member of any social or civic organizations?" When she responded in the negative, she was asked, "Have you ever been?"[77] One witness was asked, "Are you active in supporting the Elks?"[78]

Here, again, it is manifest that exposure rather than legislation explains the committee's conduct.

4. The committee as inquisitor into private opinion, belief and other personal matters.

In its efforts to "expose" the subversive activities of witnesses, the committee pursues its quarry into every area of opinion, belief and attitude, however personal and remote.

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[74] *Gerald L. K. Smith* (1946), 23.

[75] 1 *Motion Picture Industry* (1951), 60.

[76] 1 *Chicago Area* (1952), 3699.

[77] *Infiltration—Government* (1952), 3364.

[78] 1 *Investigation (Exec.)*, 40.

When one witness was asked whether or not he was married during a particular period, he inquired, "* * * is the matter of my marriage or my personal relations pertinent to this inquiry?" and the committee responded, "It certainly is." When the witness insisted, "I still don't understand in what respect this question is pertinent to the inquiry of this committee," the committee demanded, "Do you think an answer to that would incriminate you?" [79]

The committee has also found relevant to its purpose information gained from answers to the following questions: "Where were your parents born?" "Were they naturalized citizens of the United States?" [80] "What is the largest annual salary that you received while being employed or engaging in your profession in Hollywood?" [81] "If it isn't too personal, can you tell me how old your kiddies are?" [82]

One witness was asked, "Did you ever attend union meetings or other meetings of organizations which you said you belonged to at one time, at which colored people were present?" [83] Another time, a witness was asked, "Did you entertain any Negroes in your apartment, members of the Communist Party, in Knox County?" [84]

Witnesses are often subjected to a searching probe into their personal beliefs and sympathies respecting political matters, e.g., "What are your politics?" [85] "Do you believe

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[79] 1 *Motion Picture Industry* (1951), 117.

[80] 2 *Infiltration—Education* (1953) 182-183.

[81] 3 *Motion Picture Industry* (1951) 717.

[82] 3 *Los Angeles Area* (1953) 680.

[83] 3 *Investigation* (*Exec.*) 1019.

[84] *Ibid.*, 1016. We deal below with the committee's practice of compelling witnesses to act as informers.

[85] 4 *Investigation* (*Exec.*) 1774.

in communism?" [86] "Do you subscribe to the principles of the Communist Party?" [87] When one witness replied that he did not believe in communism, he was asked whether or not he believed in the "common ownership of property." [88]

Similarly, witnesses have been asked, "Are you in sympathy with the Communist Party?" [89] or "Do you approve of communism as a philosophy of government?" [90] When one witness, in response to such a question, professed ignorance of the nature of communism and exhibited a consequential reluctance to pass judgment thereon, the following colloquy between the committee and the witness ensued:

> "The Chairman: You do not know what communism is, yourself; therefore you do not know whether you are sympathetic with it, or not?
>
> Mr. Gift: I know everybody I see has a different opinion about it, so I don't know.
>
> The Chairman: Well, what is your opinion about it?
>
> Mr. Gift: Well, it is more or less confusion to me; I cannot make heads or tails of it.
>
> The Chairman: You do not know what it is all about?
>
> Mr. Gift: No.
>
> The Chairman: What do you think about Soviet Russia; do you have any opinion on that?
>
> * * * * * *
>
> The Chairman: Do you approve of the Soviet Union, or not; cannot you say that?
>
> Mr. Gift: No; I cannot say that I do.
>
> The Chairman: You cannot say you do.
>
> Mr. Gift: No.
>
> The Chairman: Well, from what you know of communism, do you believe in it, or don't you believe in it, from what you know about it?

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[86] 1 *Investigation (Exec.)* 115.

[87] *Ibid.*, 109. See also *ibid.*, 65, 86-87, 126, 250, 317.

[88] 3 *Investigation (Exec.)* 1352-1353.

[89] 1 *Investigation (Exec.)* 123; see also *ibid.*, 87.

[90] *Ibid.*, 317.

Mr. Gift: I don't know anything about it.

The Chairman: Well, you have been taking the Daily Worker for a year; haven't you been reading it?

Mr. Gift: Yes, sir.

The Chairman: From what you read in the Daily Worker, what opinion have you formed?" [91]

The denial by a witness of sympathy with communism or the Communist Party does not serve to relieve him of further inquisition:

"Mr. Starnes: You are in sympathy with the Communist Party program?

Mrs. Williams: No; I wouldn't say so. I am not interested. Let us put it that way.

Mr. Starnes: Aren't you interested in the program of extending universal suffrage?

Mrs. Williams: I am interested in that?

Mr. Starnes: You are an advocate of that?

Mrs. Williams: Yes.

Mr. Starnes: And the Communist Party is an advocate?

Mrs. Williams: True, but that does not follow——

Mr. Starnes: You are interested in the raising of wages, and the standard of living.

Mrs. Williams: True.

Mr. Starnes: You said the Communist Party was?

Mrs. Williams: Yes, but also, wait a minute——

Mr. Starnes: Then you are in sympathy, then with that aim of the party?

Mrs. Williams: With that aim?

Mr. Starnes: And with the other aim." [92]

Some witnesses have even been questioned on their exercise of the right to vote. One witness was asked whether or not he had voted for Benjamin J. Davis, Jr. for the office of City Councilman of New York City.[93] Another witness was asked, "Did you ever solicit anyone to vote for

[91] 1 *Investigation (Exec.)* 91, 92.

[92] 3 *Investigation (Exec.)* 1299-1300.

[93] 3 *Motion Picture Industry* (1951) 667.

Earl Browder for President?" When he replied in the negative, the committee continued, "Did you ever vote for him yourself?" [94]

The questioning of witnesses has frequently been carried to the point of requiring them to give their opinion with respect to purely hypothetical political situations:

> "If the United States should become involved in a war with Russia, would you support the United States or Russia?" [95]
>
> * * * * * *
>
> "If there was a war between the United States and Russia would you support and defend the United States?" [96]
>
> * * * * * *
>
> "Suppose we were at war with Russia, what would be your position as between the United States and Russia? Would you favor the United States or Russia?" [97]

Witnesses are frequently asked their opinions with respect to controversial social and political issues:

> "The Chairman: Do you approve of the Communist program that Negroes ought to be given the right to vote?
>
> Mr. Brown: They are supposed to have the right to vote at the present time.
>
> The Chairman: Do you subscribe to that belief?
>
> Mr. Brown: I don't think that anyone should be barred from voting on the basis of race or color.
>
> The Chairman: That is the Workers Party position?
>
> Mr. Brown: It is also the position of the democratic countries.

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[94] 3 *Investigation (Exec.)* 997.

[95] 1 *Motion Picture Industry* (1951) 62.

[96] 1 *Investigation (Exec.)* 107. See also *ibid.*, 115, 126; 2 *Motion Picture Industry* (1951) 470.

[97] 1 *Investigation (Exec.)* 44.

The Chairman: It is part of the program of the Workers Party to give the Negro the ballot throughout the United States, isn't that right?

Mr. Brown: I thought it was the program of all parties.

The Chairman: Well, I say isn't that the Workers Party program—never mind about race.

Mr. Brown: I would suppose it is part of it.

The Chairman: Well you have the literature here. If you don't know, you don't know.

Mr. Brown: Well, I would be able to say that with surety.

The Chairman: Do they advocate social equality between the Negro and white races?

Mr. Brown: I think so.

The Chairman: Do you believe in that?

Mr. Brown: It all depends on what you mean by that.

The Chairman: You know what social equality is?

Mr. Brown: Equal rights—certainly.

The Chairman: But as to intermarriage, and social affairs on an equality, and general intermingling of the races?" [98]

In the same vein, another witness was asked with respect to relations between Negroes and whites, "Do you believe in intermarriage between them?" "You would not favor a law prohibiting such intermarriages, would you?" "And you would oppose a law that would prevent that, or that would prevent such intermarriages?" "You would oppose any law that would prevent marriage between white and black people?" [99]

When one witness admitted having subscribed to the *Daily Worker*, he was asked, "Do you subscribe to the labor policy of the Communist Party as it is laid down in the *Daily Worker?*" After he stated that he did not know whether he did or not, the committee asked, "Well, do you think it is sound, do you believe in it?" When he ex-

[98] 3 *Investigation (Exec.)* 1341.

[99] 1 *Investigation (Exec.)* 42.

pressed his lack of interest, the committee insisted, "* * * I ask you, do you approve of the tenets, the labor tenets, of the Communist Party as they are laid down in the *Daily Worker*. You have read them over a period, a general period of time, according to your testimony. Now, do you approve of those, or do you not?" [100] Another witness who admitted that he was "familiar with the hostilities going on in Korea," was asked, "With which side in that conflict do your sympathies lie?" [101]

Asked whether or not he approved the course of action taken by this country in Korea, another witness protested that the committee was invading his right to personal opinion; whereupon the committee replied: "Every American citizen, Mr. Gordon, has an opinion with respect to the actions of this country in Korea. It is not invading the realm of opinion. Either you approve of it or you don't approve of it. I think it is a very simple question and could be answered very simply by 'Yes' or 'No'." [102]

When another witness refused to disclose his opinion with respect to a question propounded to him by the committee, he was asked "Do you understand you are thereby implying to this committee that you may be a Communist or you approve of the Communist doctrine when you refuse to take a stand?" [103]

Witnesses have even been queried with respect to their religious beliefs, identifications and affiliations:

> "Are you a Gentile or a Jewess?" [104]
>
> * * * * * *
>
> "Mr. Barker: Mr. Levinson, Mr. Chancey said you were a Jew; is that correct?

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[100] *Ibid.*, 93.

[101] 1 *Detroit Area* (1952) 2769.

[102] 4 *Motion Picture Industry* (1951) 1487.

[103] 3 *Infiltration—Education* (1953) 994.

[104] 1 *Investigation (Exec.)* 64.

Mr. Levinson: That is correct.
Mr. Barker: Are you an orthodox Jew?
Mr. Levinson: No.
Mr. Barker: Are you an atheist?
Mr. Levinson: I do not believe in God, if that is what you mean." [105]

* * * * * *

"Are you a member of any church?" [106]

* * * * * *

"Do you belong to any church? Do you recognize the Supreme Being?" [107]

* * * * * *

"The Chairman: Are you an atheist, or do you believe in God?
Miss Brooks: Well, I was not taught to believe in any God, and I do not suppose I do.
The Chairman: You were not taught to believe in God?
Miss Brooks: No.
The Chairman: Your parents are not orthodox Jews, in other words?
Miss Brooks: No." [108]

* * * * * *

"Are you a Jew?"
"Are you an orthodox Jew?"
"You do not attend the synagogue or go to church?"
"Are you an atheist?"

* * * * * *

The Chairman: Did not Lenin say that religion was an opiate for the people?
Mr. Chancey: Lenin did believe that religion was being misused by certain people.
The Chairman: I asked if he did not say that religion was an opiate for the people. Do you believe that?"

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[105] *Ibid.*, 63.

[106] 3 *Motion Picture Industry* (1951) 667.

[107] *Labor Unions* (1947) 114.

[108] 1 *Investigation (Exec.)* 66.

"You do not have any religion, do you?" [109]

* * * * * *

"There is one other question that we always ask for the record: Are you a Jew?" [110]

We find it difficult to ascertain any valid legislative purpose in all of this.

5. The use of the record to expose and punish.

In a large number of cases, the committee does not ask questions and compel answers of the witness in order to obtain information about him. It has already obtained such information and formed conclusions. The principal purpose of the oath *ex officio*, which is its chief stock in trade, is to make more effective and efficient the exposure system. By bringing to bear upon the individual in a dramatic way the full force of governmental disapproval of his political views and affiliations, the committee is ensured that the individual's recalcitrance will be justly punished.

The purpose to punish is crudely revealed when the committee repeatedly requires witnesses to state their home and office addresses publicly, although this information presumably has already appeared on the subpoena. Where the witness has expressed reluctance to state his address, the committee has compelled him to give the information.[111]

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[109] *Ibid.*, 27, 38, 43.

[110] 9 *Investigation* 5487.

[111] The following exchanges are typical:

"Mr. Moulder: Where is your office located from which you engage in the practice of law?

Mr. Steinmetz: In the city of Los Angeles.

Mr. Moulder: In what building and what office number?

Mr. Steinmetz: Does that have any pertinency? * * *

Mr. Moulder: To properly identify you, as to who you are. We are trying to designate as to just exactly who you are.

Mr. Steinmetz: I believe it is in the telegram as correctly stated there, Mr. Moulder. That is the telegram which I received summoning me to this postponed hearing.

(Footnote Continued on Page 76)

Even when the witness pleads with the committee that previous disclosures have resulted in molestation, it does not relent.[112] The committee has required one witness to restate his address at the conclusion of a line of questions to which the privilege against self-incrimination had been invoked, thus using it as a punishment for non-cooperation.[113] One witness was required to give, in addition to his address, his telephone number and social security number.[114] This practice is all the more noteworthy in view of the committee's agreement on some occasions that ad-

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(Footnote Continued from Page 75)

Mr. Moulder: Then do you refuse to answer that question?

Mr. Steinmetz: Well, my address, as I say, is correctly stated in the telegram, I believe you have a copy."

(Witness answers question) 3 *Los Angeles Professional Groups* (1952) 3912.

"Mr. Kunzig: What is your address, Professor?

Mr. Glasser: My mailing address, the record may show, is * * *. I am not giving my home address. I think you want identification of a mailing address. * * *

Mr. Kunzig: I would like to ask for your home address, and I hereby ask your home address. * * *

Mr. Doyle: Mr. Chairman, this witness is the same as any other American citizen, and we are entitled to have his residence address, and I ask that it be given.

Mr. Glasser: Under the——

Mr. Velde: Yes, the Chair decides or feels very definitely there is no reason why you should refuse your home address, and I direct you to answer that question, Professor.

Mr. Glasser: I will answer it, sir. I am going to answer it—under protest, my reason being fear of harassment.

Mr. Clardy: Mr. Chairman, may I ask that he be instructed to proceed with the answering and stop making speeches." 2 *Infiltration—Education* (1953) 181-182.

[112] See, e.g., 2 *New York City Area* (1953) 1245, witness refuses address because on a previous occasion "we had many anti-Semitic letters;" 5 *New York City Area* (1953) 2005, witness required to give address publicly after requesting that it be taken in executive session, witness explaining, "We have been molested every time there was such a hearing;" *ibid.*, 2006, "I have small children and we have been molested by some hoodlums."

[113] *Infiltration—Government* (1952) 3346, 3352.

[114] 1 *Detroit Area* (1952) 2805-2806.

dresses need not be publicly stated. Thus, the chairman did not insist when he received a negative reply from a cooperative witness to the question: "You do not want to give your street address? There is no necessity for giving your street address?" [115] And another cooperative witness was similarly not pressed:

> "Mr. Tavenner: What is your residential address?
> Mr. Pressman: Is there need for that, Mr. Chairman, to be in the record?"
> (No further questions on address.) [116]

The committee endeavors to force public testimony concerning information already verified in its records. Thus, one witness was asked:

> "Mr. Kunzig: * * * were you ever at any time suspended by the Department of Justice of the United States of America?
> Mr. Glasser: The committee has that information * * *." [117]

Another was asked about the content of the courses he taught, and when he demurred, was told:

> "The committee knows what you are teaching, and we merely want to get that one in the record. I think he should be directed to answer that question, Mr. Chairman." [118]

Witnesses have been asked to identify papers bearing their signatures or pictures so that the committee might make public the existence of the evidence.[119]

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[115] 1 *Investigation* 727.

[116] 2 *Communism in the Government* (1950) 2847.

[117] 2 *Infiltration—Education* (1953) 196.

[118] 4 *Infiltration—Education* (1953) 1137.

[119] 1 *Motion Picture Industry* (1951) 179-185; 2 *Motion Picture Industry* (1951) 319-320; 2 *Chicago Area* (1952) 3804-3805, 3808-3809; 2 *Detroit Area* (1952) 3004-3005.

The patent unfairness of this practice is obvious even to committee members. When Larry Parks was asked to identify certain persons as Communists, and demurred, Congressman Walter asked:

> "How can it be material to the purpose of this inquiry to have the names of people when we already know them?" [120]

And Counsel Tavenner volunteered that certain questions he was putting to Parks, on the objects of various organizations, were

> "the subject of the testimony of about 20 witnesses or more here." [121]

Many have been required to appear before the committee in public session more than once, when there is good publicity value in a second hearing or when an anticipated discharge did not result from the first hearing. A recent example of this was the testimony of Professor Byron T. Darling of Ohio State University, who testified before the committee in March 1953 in Washington, in hearings concerning Communist infiltration into education.[122] He was recalled in June 1953, when a subcommittee chaired by Congressman Scherer of Ohio conducted hearings into Communist activities in the Columbus area.[123] Many of the questions asked in the second hearing had already been asked and answered in the first.[124]

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[120] 1 *Motion Picture Industry* (1951) 93.

[121] *Ibid.*, 94.

[122] 2 *Infiltration—Education* (1953) 129-154.

[123] *Columbus Area* (1953) 1795-1823. Other instances of duplication are: Charles Kramer, *Espionage in the Government* (1948) 818-835 and 2 *Communism in the Government* (1950) 2937-2950; Steve Nelson, *Hearings Regarding Steve Nelson* (1949) 129-153 and 1 *Radiation Laboratory* (1949) 315-316; Clarence Hiskey, *Excerpts from Atom Bomb Hearings* (1948) 1-9 and *Hearings Regarding Clarence Hiskey* (1949) 383-398.

[124] E.g., "state for the record your educational background;" "state for the record your employment record;" "have you ever traveled abroad?"; "when?"; "would you explain to the committee what that conference was?"; "Have you ever been a member of the Communist Party?"

The only rational explanation for the committee's practices discussed in this portion of the brief is that the committee is not concerned with obtaining information for legislative purposes but seeks rather to expose and punish.

6. The committee's need for informers in order to operate its exposure system.

Witnesses before the committee are divided into two groups, "hostile" and "friendly" witnesses. In order to earn the committee's approval as a friendly rather than a hostile witness, the individual is required not merely to identify his own political views and affiliations but must inform on others. If he is willing to do the one, but cannot bring himself to do the other, he is not deemed to be a friendly witness, and the committee will not give him a "clearance."

This demand for "names" is entirely logical since the life-blood of the committee is the exposure of a never-ending stream of individuals. Without "names" the committee would grind to a halt like a locomotive without steam.[125] The pressures to inform are not only contempt sanctions, but the harassment and blacklisting resulting from publicity.

The committee technique of soliciting from ex-Communists lists of the names of their former colleagues is well known, and in most hearings, constitutes the only "information" ever sought by this "legislative" committee. The testimony of most friendly witnesses is devoted to a brief description of the witness' past activities and a lengthy list of the persons with whom he was associated.[126] One, for

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[125] In order to supply its ravenous appetite for "names" the committee has increasingly resorted to the service of professional informers. See, for example, 5-8 *New York City Area* (1953).

[126] See, for example, *Cincinnati Area* (1950) 2661-2713, 2803-2821; 5 *Los Angeles Area* (1953) 867-900, 901-907; 1 *Chicago Area* (1952) 3632-3639; 4 *Motion Picture Industry* (1951) 1426-1434.

example, identified about two hundred persons as Communists.[127]

The committee's obsessive preoccupation with names was manifested when a former West Coast newspaperman turned over to the committee the names of a large group of alleged Communists. Committee member Jackson told the press that the list was "one of the choicest crops of Communists this committee has ever received."

The committee thus evaluated its motion picture investigation:

> "The committee's investigation of the motion picture industry was concerned almost entirely with the problem of exposure of the actual members of the Communist Party. * * *"[128]

The committee accumulates and publishes, in addition to the names of "subversives," those of "traitors,"[129] and of "subversives" who are citizens of and residing in other nations.[130]

While the source of the committee's lists is the testimony of "friendly" witnesses, the committee persists in questioning "hostile" witnesses concerning the affiliations and beliefs of others, with the knowledge that the mere mention of the name and refusal to testify in that context will stigmatize the individuals involved. Thus, the committee asked one witness questions concerning seventeen persons, although from the beginning it was apparent that he would not discuss them.[131]

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[127] Testimony of Harvey M. Matusow, *Youth Groups* (1952) 3273-3339; *Annual Report*, 1952, 70-73.

[128] *Annual Report*, 1951, 8. See also evaluation of Baltimore investigation, *ibid.*, 12. See also *ibid.*, 2; Thomas, *10 Years of Vigilance* (1948) 5, 6.

[129] *Annual Report*, 1951, 23.

[130] 1 *Albany Area* (1953) 2378-2379.

[131] 1 *Baltimore Area* (1951) 851-852. See also 3 *Infiltration—Education* (1953) 999-1102; 1 *Motion Picture Industry* (1951) 70-71; *Massachusetts* (1951) 1391.

The committee has demanded names where such information could be used only to harm persons who have no connection with the matter under inquiry. Thus, when two witnesses testified they ran a summer camp for children, the following exchange occurred:

> "Mr. Doyle: Counselors?
>
> Mrs. Granich: These are high school kids who help the kids have a good time.
>
> * * * * * * *
>
> Mr. Doyle: Tell me definitely the name of one counselor that you had last summer * * *. Tell me the name of one person.
>
> * * * * * * *
>
> Mr. Doyle: You would not have any hesitation about giving the names of your counselors in executive session, would you?
>
> * * * * * * *
>
> Mr. Doyle: * * * do you have a list of the counselors who were at your camp last summer?
>
> * * * * * * *
>
> Mr. Doyle: And the addresses of the counselors are on that list * * * are they not?" [132]

The committee is interested in adding to its dossiers not only high school children, but also persons who happen to attend social gatherings at which a Communist is present.[133]

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[132] *Communist Press* (1952) 2303-2306.

[133] Thus, Dr. Frank F. Oppenheimer, after testifying that he had met a prominent Communist on two occasions, was asked:

> "Mr. Velde: Was anyone with Steve Nelson when you met him?
>
> Dr. Oppenheimer: I met him at a social gathering where there were other people present.
>
> * * * * * * *
>
> Mr. Velde: Will you state the names of the other persons present?
>
> Dr. Oppenheimer: No.
>
> Mr. Velde: You do know the names of some of the people who were present?
>
> Dr. Oppenheimer: I do." 1 *Radiation Laboratory* (1949) 369-370.

The committee's unceasing efforts to force its witnesses to become informers has on some occasions encountered sharp resistance on moral grounds and on the ground that the committee already possessed the information sought.[134]

It should be noted that the committee was not always so insistent on the identification of individuals. In the period when the committee heard witnesses on the American nazi movement, it honored the request of a Bundist leader not to be required to furnish a membership list, on the ground that "* * * it may get into the hands of the enemy."[135]

When a witness voluntarily decides to be a friendly witness, or is forced by pressures to overcome his moral scruples, he is subjected to an intensive grilling concerning his former associates.[136]

[134] See, e.g., the testimony of Dr. David Hawkins:

> I have really no desire to inhibit or impede the investigations of your committee, sir; and if I knew of anything connecting individuals about whom I feel this hesitation with the radiation laboratory or with any crimes in which they might have been directly or indirectly involved, I would not feel any hesitation; but, not having such knowledge, I feel very deeply—and I am sure you will agree with this proposition—that there are certain fundamental relations of trust which tend to distinguish American society from other societies in the world today; and, unless this kind of question is to your knowledge directly or indirectly related to the subjects you are investigating, I would very much like to ask not to be asked such a question.
>
> "If there is information of this sort that you would like to get, I would just ask whether there may not be more efficient or direct ways to get it, such as asking the question of the individual himself rather than of me." 3 *Radiation Laboratory* (1950) 3428.

See also testimony of Frances P. Hawkins, *ibid.*, 3455-3456; Larry Parks, 1 *Motion Picture Industry* (1951) 87, 93-94; Lillian Hellman, 8 *Motion Picture Industry* (1952) 3545-3546.

[135] 4 *Investigation (Exec.)* 1582.

[136] The following questions, taken from the testimony of David K. Kamaker, are illustrative of this type of examination:

> "Will you state to the committee where you have worked in the past five or ten or fifteen years?"

(Footnote Continued on Page 83)

7. The committee's use of publicity, black lists and firings as weapons of the exposure system.

The exposure system which is the heart of the committee's functioning vitally depends upon the use of publicity. The committee uses publicity both to promote approval of its

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(Footnote Continued from Page 82)

"Have you ever been a member of the Communist Party?"

"Who approached you to ask you to join the Communist Party?"

"Tell us just how you became a member."

"Did you attend a meeting before the time you joined?"

"Did you join at that time?"

"Did you sign a party card?"

"Who gave it to you?"

"Did you pay dues?"

"To who did you pay the dues?"

"Can you tell the committee who were present at the meeting when you joined the party?"

"Did you buy or were you given any Communist literature while you were a member of the party?"

"Who gave it to you?"

"How many meetings did you attend?"

"Can you name any other persons you have not already named who attended those meetings when you were there?"

"After you dropped out of the party, were you ever asked to come back in the party again?"

"Who asked you?"

"Did you join again?"

"When you dropped out of the party, after being in it about five months, what did you do with your membership book?"

"What did you do with literature that had been given to you?" 1 *Hawaii* (1950) 1467-1469.

Another friendly witness was interrogated in the following manner:

When she was married and how and when her marriage terminated; whether she was or had been a member of the Communist Party; what led her to join; who actually recruited her; whether she paid dues and how much; who suggested that she make contributions; when did her husband join; whether she got a membership card, and what she did with it; the names of the Communist Party groups in Cincinnati; who were the members of her group; what were their occupations and where did they live; how to spell the names of these members; (at

(Footnote Continued on Page 84)

activities and to prejudice and intimidate the witness. Long ago the committee learned how to time hearings so as to create before the noon recess a good headline for the afternoon press and before the close of the session a new lead for next morning's newspapers. The committee is equally adept at other forms of publicity. It releases its hearings and reports at strategically selected times so as to "take the play away" from the witness.[137] Today committee hearings are carefully staged publicity performances with a full panoply of reporters, flood lights, television and newsreel cameras and radio recorders, de-

(Footnote Continued from Page 83)

this point the witness gave an extensive account of names, occupations, and personal data of those she described as members of the party) at whose house the witness picked up copies of the Communist newspaper that she distributed; who instructed her on selling the newspaper to Negroes; who were the Communists in the Political Action Committee; what were the occupations of these Communists; was she requested to purchase party literature; who sold it to her; what party meetings had she attended outside Cincinnati; who was there; whether a certain individual was affiliated with the Communists; (at this stage of the questioning, an exhibit was introduced by the committee into the record indicating that this person had been with the American Military Government in Korea; the committee then decided to investigate his appointment) what was the "UE unit"; who attended its meetings; who prepared certain leaflets sent out to the locals; who edited these leaflets; whether there was any attempt to infiltrate Communists into the armed forces; whether the question of revolution was discussed; whether she could identify a photograph of a certain person named as a Communist; who were the members of the fur and leather workers' cell; (the committee introduced into the record at this point the fact that one of the persons named by the witness "signed a statement opposing the anti-Communist bill" and that a second, together with his wife, signed Communist Party election petitions in Ohio in 1940). *Cincinnati Area* (1950) 2781-2796.

[137] For example, during the hearings involving Rev. Jack R. McMichael, the committee issued together with a press release, hearings involving another clergyman which were held two years earlier. *New York Times*, Aug. 1, 1953; 83d Cong., 1st Sess., *Testimony of Stephen H. Fritchman*, Sept. 12, 1951.

signed to ruin the individual in the public eye. The committee's hearings are a modern spectacle akin to the performances in the Roman Colosseum.[138]

The logic of its existence compels the committee to put on a show. It must startle, reveal, uncover, discover. It must accuse, charge, insinuate, incriminate, clear, vindicate. It must anticipate great revelations, promise blood-curdling spy stories, call mystery witnesses and hold surprise hearings. This is the stuff of which headlines are made and this is the way the committee makes headlines.

Committee activities have never lacked for good coverage and committee members, outside of hearings, are treated generously by the press. A reciprocal relationship exists between committee members and certain journalists, whereby the newspapermen pass leads to the committee in exchange for private leaks.[139] The effect of the press leakages is that many persons are attacked in the press long before they appear as witnesses.[140]

The committee also helps color public impression of testimony by announcing in advance of his appearance the

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[138] The use of the executive session to screen out undramatic matter (see *infra*), "confrontation" by paid informers, abuse and physical ejection of counsel all contribute toward the liveliness of the affair.

[139] Carr, *op. cit.*, 391-392.

[140] The synthetic manufacture of headlines by big talk of impending hearings that never materialize is a common committee practice. Carr lists such examples as the announcement of a mystery witness whose testimony "would crack wide open the whole Soviet spy case" where no such witness ever appeared to testify with such startling effect (*Op. cit.*, 395, and newspapers there cited; see also Carr, *op. cit.*, 174; 86 C. R. 13768). When Lawrence Duggan died from a fall from a window, the *New York Times* reported in a front page headline that he was "named with Hiss in Spy Ring Inquiry." *New York Times*, Dec. 21, 1948. This headline resulted from a press statement issued by Representative (now Senator) Mundt five hours after Duggan's death. Mundt and Representative (now Vice-President) Nixon made public testimony—later repudiated—that Duggan had been named by Chambers. *Ibid.*, Dec. 22, 1948.

subpoenaing of a witness, "identifying" him and intimating what he is expected to testify on,[141] and by announcing the committee's impression of what was said in executive session without making public the actual transcript.

The committee has a way of attacking a person without the formality of a hearing of any sort. This is accomplished by releasing to the press and public "unverified" information, charges and gossip from its "secret files." Such public releases enable the committee to escape responsibility for its attacks through formal disclaimer that they reflect the official view of the committee.[142]

The committee sometimes uses publicity quite crudely as a form of intimidation. In one instance, after being asked if he were a member of the Communist Party, and before answering, a witness requested the removal of the cameras. Representative Velde replied:

> "Well, now, may I ask the witness this: If I do order —or if the committee does order—the cameras turned off and the lights turned off, would the witness then answer the questions put to him by counsel?
>
> "Mr. Cohen. Well, I would feel more at ease.
>
> "Mr. Velde. Well, would you answer the question as to your membership in the Communist Party if the lights were turned off and the television and newsreel cameras ordered to desist? Would you then be willing to cooperate with the committee in that regard?" [143]

Although the committee professes to rely upon the processes of public opinion, it takes no chances. Its attack

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[141] E.g., preview of Lee Pressman's appearance in *New York Herald Tribune*, August 27, 1950.

[142] See "A Velde 'File' Dissected," *Washington Post*, April 5, 1953, and "Sherrill Protests Inquiry Procedure," *New York Times*, July 20, 1953.

[143] 2 *New York City Area* (1953) 1237, 1238. See also 3 *New York City Area*, 1343-1345. This incident is all the more remarkable in the face of the committee's professed policy to remove, if there is objection from the witness, lights, newsreel and television cameras.

on individuals does not end with mere exposure. The committee also seeks the dismissal of persons it considers "subversive" from public and private employment and union office. To this end, it cooperates with private industrial and pressure groups to draw up lists of subversive organizations and to single out individuals whose affiliations and beliefs should be the basis for loss of employment. This is one of its stated goals [144] and is perhaps most clearly shown in connection with its various Hollywood investigations.[145] The committee was responsible for the legislation depriving three government employees of their positions, later declared unconstitutional as a bill of attainder.[146] The committee boasts that its hearings on Louis Dolivet resulted in his loss of United Nations employment and removal as editor of United Nations World.[147]

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[144] 9 *Investigation* 5447; *New York Times*, Dec. 26, 1946; *Ibid.*, Jan. 23, 1947.

The committee has initiated investigations at the request of private groups and individuals. As it has stated:

> "The committee has formulated the policy of investigating complaints received from American citizens who have the interest of the United States foremost in their hearts and minds. In each instance the committee has undertaken an investigation only upon complaints by citizens." 79th Cong., 2d Sess., H. Rept. 2233.

When the committee demanded the radio scripts of selected news commentators, Representative Landis declared:

> "As a public agency we are compelled to respect a reasonable request from substantial citizens." 92 C. R. A3149 (1946).

The committee's request that American institutions of higher learning submit textbook lists was justified on the grounds that the investigation was requested by the National Council of the Sons of the American Revolution. Carr, *op. cit.*, 283.

[145] See *Motion Picture Industry* (1947) 49, 50, 52-53, 66, 393, 522.

[146] *United States* v. *Lovett*, 328 U. S. 303, 308, 309, 315.

[147] *Annual Report*, 1950, 4-5.

The committee's subpoenaing of Dr. Frank F. Oppenheimer resulted in the acceptance of his resignation by the University of Minnesota.[148]

The reasons why the committee goes to the lengths which we have described (*supra*, pp. 75-76) to identify names and addresses can be gathered from the following description of the consequences by a hostile witness:

> "I left the University of California Medical School to accept a position as chief radiologist at St. Joseph Hospital in Orange, Calif. I held that position for seven and one-half years, actually until September 22, 1951, when I was asked to resign because of a mention of my home on the previous day by you, Mr. Tavenner, when you examined one of the doctors during that period of the hearing.
>
> "After the mention of my home, I might say, two times, with you spelling my name, I received a telephone call the next day * * *.
>
> * * * * * * *
>
> "Dr. Pennes. That incident changed the course of my whole medical career, and I think I can take 30 seconds to mention it.
>
> "On September 21, while you were questioning a doctor, you asked him whether there was a certain type of meeting in my home, and you mentioned my name twice, and you spelled out my name to make sure that everybody got it, and the following day at 10 o'clock in the morning the superintendent of the hospital asked me to resign because of the associated publicity. This, mind you, after seven and one-half years of excellent service, admitted by the superintendent of the hospital."[149]

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[148] *The New York Times*, June 15, 1949. See also Anderson case in Barth, *The Loyalty of Free Men*, 70-71. Committees have achieved ultimate success in their drive to punish dissenters in several instances where a congressional investigation or a resulting black list contributed to the premature death of a committee witness. Such committee victims were John Garfield, Canada Lee, Tom O'Connor and Harry Dexter White.

[149] 4 *Los Angeles Professional Groups* (1952) 4116. The meeting referred to was "a meeting of the medical division of the Arts, Sciences and Professions." *Ibid.*, 4116-4117.

On the other hand, cooperation with the committee is rewarded. One witness was told by Mr. Velde:

> "We are out to determine, to ascertain facts relative to subversive activities in this country; and I believe—of course, I cannot speak for United Press—if you would furnish us the information that we are asking that probably your job would be a lot more safe than it is at the present time—" [150]

The committee uses its powers not only to instigate loss of employment and blacklisting, but, as we shall show (*infra*, pp. 120-121), to give "clearance" to, and thus to qualify for employment, those under a political cloud. If there is any constitutional connection between these functions of the committee and the power of inquiry, it has completely eluded us.

B. The committee as an instrumentality for attacking organizations.

1. The attack on political organizations.

The "subversive" organization is the vehicle through which the committee has increasingly expanded its jurisdiction and activity. The committee regards certain organizations and movements as "subversive" because of their alleged domination by the Communist Party, because they entertain particular objectives which Communists also entertain, because they had never been aggressively anti-Communist, because their officers, sponsors or mem-

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[150] 3 *Infiltration—Education* (1953) 997. See also 1 *Motion Picture Industry* (1951) 110: "Don't you think that that question [end of witness' acting career because of committee subpoena] might be influenced to some extent by the fullness of the cooperation that you give to the committee * * *?"

In the recently conducted committee hearings in San Francisco, several of the witnesses complained that the fact that they had been subpoenaed had resulted in loss of their jobs. When these witnesses pleaded the privilege against self-incrimination, committee members promised aid in obtaining their reinstatement if the witnesses answered their questions. *New York Times*, Dec. 9, 1953.

bers have been "exposed" by the committee as "subversive," [151] or because some other committee or officer of government has "listed" [152] them as "subversive" organizations. The committee has devised an elaborate terminology of organizational consanguinity to the Communist parent stock. These terms include "Communist-dominated," "Communist front," "Communist satellite," "Communist transmission belt," "arm of the Communist Party," "formed to advance Communist aims." Thus the mere fact that the individual is not a Communist Party member does not spare him from harassment or exposure.[153]

Just as the committee substituted for an investigation of propaganda the exposure of individuals as its principal activity, so it has largely ignored the propaganda of organizations and has dealt with the organizations as such. This phase of the committee's activity has enlarged its jurisdiction so as to make it a governmental censor of a wide variety of private associations. The committee attacks organizations in four inter-related ways. First, some of its reports deal exclusively with organizations; for example, in 1944 it issued a report on the CIO Political Action Committee (78th Cong., 2d Sess., H. Rept. 1311); in 1947 it issued reports, among others, on the Southern Conference for Human Welfare (80th Cong., 1st Sess., H. Rept. 592) and on the Civil Rights Congress (80th Cong., 1st Sess., H. Rept. 1115); in 1949, it issued a "Review of the Scientific and Cultural Conference for World Peace;" in 1950, the organizations reported on included the National Lawyers Guild, the National Committee to Defeat the Mundt Bill, and the *Honolulu Record;* and in 1952, it issued, among other attacks on organizations, a "Review of the Methodist Federation for Social Action."

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[151] This exposure in turn frequently rests upon the individual's relationship to other organizations deemed by the committee to be "subversive."

[152] The counterpart in the organizational field to "exposure."

[153] For a recent example, see the hearing of Bishop Oxnam, *supra.*

Second, in the course of its hearings the committee pursues a technique of questioning the witness concerning his relationship with particular organizations. It then puts into the record its own charges concerning the organization and its "subversive" nature.

Third, in its annual reports, the committee singles out particular organizations or causes and denounces them as subversive.

Fourth, as a separate project, the committee has its own listing of organizations. This *Burke's Peerage* of organizational "subversion" is not a report on legislation or a legislative subject matter. It is not a report to Congress at all. The latest revised edition is *Guide to Subversive Organizations and Publications*, 82d Cong., 1st Sess., H. Doc. 137. This compendium lists in alphabetical order some 639 organizations and 204 publications and identifies the government agencies which have cited them adversely.[154] A striking characteristic of the list is the fact that many of the citations turn out to be by the committee itself, supplemented by state committees of the same character.[155] Among the organizations cited are Almanac Singers; Allied Voters against Coudert (a New York organization cited "as a Communist front" by the California Committee on Un-American Activities); American Committee for Anti-Nazi Literature (cited by California committee); American Committee of Liberals for the Freedom of Mooney and Billings; American Council, Institute of Pacific Relations (in response to this organization's request for the deletion of its name, the committee states that the characterization "will continue pending the result of

[154] Early editions of this work also drew upon private sources, see *Citations by Official Government or State or Municipal Agencies or Reliable Private Organizations Regarding the Character of the Organization Named*, 1946.

[155] The organizations thus condemned receive no hearing. *Cf. Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

* * * investigations" by the California committee and a United States Senate committee); American Friends of Spanish Democracy; American Investors Union, Inc. (of "Communist complexion"); American Labor Party; American Round Table on India; American Relief Ship for Spain (cited by the committee itself as having "raised funds for the Communist end of that civil war"); Associated Magazine Contributors; Book Find Club; Citizens Committee to Aid Locked-out Hearst Employees; Committee for Civil Rights for Communists; Committee for Peaceful Alternatives to the Atlantic Pact; Committee to Defend Angelo Herndon; Connecticut State Youth Conference; Federated Press; Freedom from Fear Committee; Illinois People's Conference for Legislative Action; International Congress of Women; Jewish Black Book Committee of Los Angeles; League Against Yellow Journalism; League for Protection of Minority Rights; League of Women Shoppers; Methodist Federation for Social Service (cited by the California committee as having admitted "cooperation with * * * the Communists"); National Committee to Aid the Victims of German Fascism; National Committee to Defeat the Mundt Bill (cited from the committee's report on the organization, *supra*, as a group "which has carried out the objectives of the Communist Party in its fight against anti-subversive legislation"); National Lawyers Guild; National People's Committee Against Hearst; Milk Consumers Protective Committee; Joint Committee of Trade Unions on Social Work; Non-Partisan Committee for the Re-election of Vito Marcantonio; Progressive Citizens of America; Scottsboro Defense Committee; Sleepy Lagoon Defense Committee; Southern Conference for Human Welfare (cited by the committee because it "received money from the Robert Marshall Foundation, one of the principal sources of funds by which many Communist fronts operate"); Sweethearts of Servicemen (cited by the committee because "its maiden effort was a delegation of seventy-five young women who arrived in Washington to

petition Congress 'to give their soldier boy friends and husbands the chance to vote in the 1944 Presidential elections'"); Teen-age Art Club; Washington (D. C.) CIO Committee to Reinstate Helen Miller; and Young People's Records. Among the publications listed as subversive are: *Allied Labor News Service, California Eagle, Chicago Star, China Aid News, Friday, Guild Lawyer, Honolulu Record, IJA Monthly Bulletin, In Fact, Labor Herald* (of the California CIO); *Lawyers Guild Review; Reader's Scope.*

The committee condemns organizations by relating their goals to its version of what is communistic. To this test of guilt by parallelism or mutual object the committee adds guilt by association. This is necessary if the membership of the organization is to be exposed.[156] When the chain of

[156] The standards employed by the committee in thus condemning organizations are analyzed in Gellhorn, *Report on a Report of the House Committee on un-American Activities,* 60 Harvard L. R. 1193. This article establishes the tendentious standards relied on to support the judgment of organizational "subversion." It concludes that the accusations against the Southern Conference were "not founded on credible evidence. From semi-truths the committee has drawn conclusions which would be strained even if the factual assertions of the report were beyond challenge. The report demonstrates, not that the Southern Conference is a corrupt organization, but that the committee has been either intolerably incompetent or designedly intent upon publicizing misinformation."

As Professor Robert E. Cushman has put it:

> "Under the guise of attacking communism he [Mr. Dies] was able to attack all so-called liberal ideas in the field of politics and economics. This was done by pinning the label of communism on all persons who belonged to any society or organization in which there ever had been any Communist member, or any idea, theory, or action of which any Communist had ever approved." Cushman, "Civil Liberty and Public Opinion," in *Safeguarding Civil Liberty Today. The Edward L. Bernays Lectures of 1944 given at Cornell University* (1945), 100, 101.

Professor Cushman pointed out that he and Professor Carl L. Becker had been placed on the committee's "subversive" list because they had been among the thousands of signers of a petition to President Roosevelt urging recognition of the Soviet Union, an action which, of course, the President subsequently took, despite the fact that it was also urged by the Communist Party.

proof is strained, the committee reminds the unconvinced that the absence of proof in itself condemns the organization as a Communist front. "Being part of a conspiratorial movement, their essence is deception." *Guide*, 3.

The committee invariably regards as a fit target for exposure an individual who joined or belongs to an organization considered by it to be subversive, even if he denies membership in the Communist Party. In the same way, the failure to abandon an organization with the proper degree of promptness or publicity after it becomes suspect is evidence of subversion. Under the committee's standards, the very least which may be charged against such an individual is that he is a "dupe." [157] If he is unwilling publicly to confess that he was a "dupe" and if he is identified with other organizations disapproved of by the committee, then he must be regarded as a secret Communist Party member.[158]

Coupled with the use of all forms of derived guilt is another hallmark of the committee's functioning—the removal of political expression from its relevant context. The passage of time plays no part in the committee's exposure operation. The fact that the witness may have belonged to organizations disapproved by the committee as long ago as twenty years, is sufficient justification for subpoenaing and exposing him. The fact that political

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[157] The committee regards as least reprehensible in the order of offenders "Those who have been attracted by the high-sounding aims of the front organization or organizations, by the prominence of its sponsors, or by a desire to be sociable." However, it must not be assumed that even such individuals can escape the committee's criticism. "The judgment of such persons is certainly open to criticism just as much as if they aided in launching any other hoax." *Guide*, 5.

[158] "This category may be recognized by the regularity with which it follows the line of the Communist Party, throughout all its variations, by the number of different front affiliations, by the posts they occupy in these front organizations, and by the fact that they retain their affiliation after the organization has been publicly exposed." *Ibid.*

expression is almost always a response to a particular political situation and that it changes with the passage of time does not prevent the individual's exposure.

As the supply of exposable Communist Party members dries up, the committee shifts the center of the "Communist plot" and broadens its scope by ever more remote chains of association to include thousands of Americans who resort to concerted group activity to curb the evils of the world they live in. The committee has already stultified the exercise of this right and made a badge of social acceptability an individual's boast that he is not a "joiner." And it must be noted that this constitutionally protected right has fallen victim not to a legislative purpose but to "exposure." Indeed, the attack on organizations involves a double exposure: the organization is exposed ("listed") so that the individuals belonging to it may be exposed.

2. The committee's attack on labor unions and their activities.

A key form of association in American life which has been a target of the committee is the labor union. As we have pointed out, the investigation of the Union by the committee was, when it was initiated, marked by an attempt to intervene in a local, internal union election. From the very beginning, the committee has so timed its activities in labor matters as to ally the force of government either with the employer or with a particular union faction.

In 1941, Representative Dies fought the striking Transport Workers Union of New York with the release of a committee report charging that Communist leadership prevented settlement of the strike.[159] When an aircraft strike was declared in California, Dies spoke in Congress against its leader.[160] He charged Communist domination

[159] *Investigation*, Appendix V, Transport Workers Union (1941).

[160] 87 C. R. 2355 (1941).

of the CIO Steelworkers Organizing Committee when he learned it was considering a strike.[161] The late CIO President Philip Murray, in a communication to the committee on March 27, 1941, said:

> "It seems strangely significant that your groundless charges against C. I. O. always come at a time when they can do the most harm. Obviously you are aware of the negotiations now being conducted with the United States Steel Corporation and the coal operators. I also recall your moving into Chicago last year at exactly the same time that a C. I. O. union was engaged in a Labor Board election at the Armour & Co. Plants." [162]

When an aluminum industry strike for a wage increase occurred in Cleveland in 1941, the committee subpoenaed the regional director of the union, who was in Washington to appear before a mediation board, and charged him with Communist affiliations.[163]

In the 1947 investigation into communism in labor unions, the committee launched an inquiry into a union which conducted a major strike against the R. J. Reynolds Company of North Carolina.[164] The reason for the investigation was thus stated by a committee member:

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[161] *Ibid.*, A1352-53.

[162] *Ibid.*, A1509. The incident referred to by Mr. Murray occurred when the committee visited Chicago, four days before an election in the Armour plant set for November 21, 1939. According to the *Chicago Times* of November 17, 1939, "Van A. Bittner, chairman of the Packinghouse Workers Organizing Committee, charged the Dies inquiry is an attempt to influence the election * * *." On November 20, 1939, the *Chicago Times* reported, "a resolution accusing Representative Martin Dies of trying to break up the CIO Farm Equipment Workers Organizing Committee, Local 101, was adopted today by 600 stewards and union members. The union is about to negotiate for a wage increase at the IHC tractor works."

[163] 14 *Investigation* 8597-8643.

[164] *Labor Unions* (1947) 117.

"Mr. Bonner. * * * a representative from that locality came up and asked for assistance." [165]

In 1939, a witness subpoenaed on the eve of an inter-union election observed:

"I take no position in connection with the impending election, but insofar as the election is to be next Tuesday, and in as far as the leaders of the union on the C. I. O. side have been subpoenaed to come before you and the leaders of the union on the Federation of Labor side have not been subpoenaed to come before you, it seems to me unfair prejudice in favor of the Federation of Labor." [166]

When the committee investigated in Massachusetts, it was alleged:

"* * * this committee was the most potent weapon our opponents had in our most recent elections, the one they used the most. They [the committee] subpoenaed other witnesses that were mentioned * * * on July 20. * * * They waited until 36 hours before a very important election at GE to subpoena me. The opposing union knew all about it and announced it to their members and told them to keep it quiet until the subpoena was served at 4 o'clock. It was served promptly at 4 o'clock, which they knew it would be.

"They dashed into the streets with an already prepared printed leaflet telling how the government had grabbed Tormey, hoping to take the election with that little trick." [167]

On August 3, 1949, just prior to the election of delegates to UE's convention, the committee subpoenaed the officers of UE Westinghouse Local 601, Pittsburgh. Hearings were held in Washington beginning August 9th, and local

[165] *Ibid.*, 120. The committee has been criticized in Congress for its interference in strikes. 84 C. R. 443 (1939).

[166] 1 *Investigation (Exec.)* 301.

[167] *Massachusetts* (1951) 1384. For a review of early anti-labor activities, see Thomas, *op. cit.*, 6, 7, 9.

leaders Fitzpatrick, Panzino, Quinn and Whisner appeared. Mr. Fitzpatrick stated: "* * * I would like to make this brief statement. We are in the midst of an election in 601 and us four fellows subpoenaed for today are candidates in that election." [168]

On June 15, 1950, during an election campaign at the Sylvania Company's plants in Mill Hall, Emporium and Warren, Pa., four UE organizers active in that campaign were subpoenaed by the committee to appear on July 10th in Washington. As a result, on June 20, 1950, one day before the election at these plants, the *Cameron County Press* issued a special edition, the first time in the history of the paper, established in 1866. The banner headline read: "U. S. GOVERNMENT SUBPOENAS BEN RISKIN." [169] On July 10th the four subpoenaed witnesses went to Washingington, but they were not called until they themselves protested. Thereupon two of the witnesses were called for a cursory hearing.[170] The subpoenas for the other two, one of whom was Mr. Riskin, lapsed at the close of that session of Congress and they were never called.

The significance of the committee's activities is demonstrated in the *Daily Evening Item* of Lynn, Mass., of August 15, 1951. On its first page the newspaper proclaimed, "16,000 TO BALLOT IN GE POLL," and on the same page it ran the headline, "U. S. CALLS UE ORGANIZER TO CAPITAL GRILL," below which appeared: "Almost on the eve of the collective bargaining election tomorrow at the River Works and Everett plants of the General Electric Company, a United States marshal served a subpoena on Don Tormey, of Beverly, an organizer for the United Electrical Workers, Independent, to appear before the House Un-American Activities Committee." Mr. Tormey was not

[168] 1 *Infiltration—Labor Unions* (1949) 601.

[169] The union representative at the Sylvania plants.

[170] 3 *Infiltration—Labor Unions* (1950).

called before the committee, however, until October 11, 1951.[171]

On October 13, 1952, the Union was investigated again, this time in Philadelphia. Announcement was made in the press (*The Philadelphia Inquirer*) of the coming of the committee on June 29, 1952, just three days before a National Labor Relations Board election at the Eby Company on July 2, 1952. The subpoenaed individual, business agent of the UE local, was in charge of the election campaign. Curiously enough, he was not called to testify in Philadelphia until October 13, 1952.[172]

Congressman Wood, when chairman of the committee, acknowledged that he was not indifferent to the impact of its activities upon union elections:

> "Now, if by any act of mine—and I speak for myself only, as chairman of this committee, but individually—if by any act of mine I have been able to bring before this committee officials of an organization who cloak themselves with the Fifth Amendment to refuse to answer as to whether they are members of an organization that is conspiring to overthrow this government, and if by doing that I have caused them to lose a labor union election in this country, I would be very happy about it myself." [173]

When UE negotiations with the International Harvester Company were in progress in Chicago, the committee subpoenaed the chairman and members of the UE negotiating team. The company seized the opportunity to publish a letter announcing the investigation even before the subpoenas were issued.[174] When a request was made at the same hearing that testimony by other members of the negotiating team be postponed until the end of the strike, the committee, despite its "previous policy * * * that we will not retain here those witnesses who are actually en-

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[171] *Massachusetts* (1951) 1371.

[172] *Philadelphia Area* (1952) 4329.

[173] *Massachusetts* (1951) 1386.

[174] 1 *Chicago Area* (1952) 3704.

gaged in this negotiation work," called the witnesses nevertheless. "But, since they are here, counsel does desire, I believe, to ask them one question." The negotiating team was called, "all three at the same time," sworn in together and asked en masse the question that could not be postponed until after the negotiations, "* * * are you now or have you ever been a member of the Communist Party?" [175]

The committee strives to give a "security" coloration to its attacks on unions. See *infra*, p. 166. A particularly transparent use of the "security" gambit is seen in the following testimony which a "friendly" witness was cued to give concerning the United Office and Professional Workers Union:

> "Mr. Tavenner. Mr. Philbrick, can you give the committee any further information that might be pertinent to the infiltration of communism into the defense areas, particularly into basic industries, particularly into the fields of finance and communications?
>
> "Mr. Philbrick. I don't believe we included that this John Hancock organizing campaign was successful for the party, and that they were able to set up the UOPWA union at the John Hancock Insurance Co. at that time." [176]

But not even a pretense that it was pursuing a federal subject matter disguised the committee's recent intervention in the Hearn's department store strike. The committee subpoenaed the leaders of the Distributive, Processing and Office Workers of America, CIO, while that union was engaged in a long and serious strike with Hearn's department store, and both sides were making urgent pleas for public support. A formal request by the union officers that "these hearings be adjourned until the Hearns strike is closed" was rejected by the committee.[177] In the course

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[175] *Ibid.*, 3718-3719.

[176] *Massachusetts* (1951) 1299.

[177] 5 *New York City Area* (1953) 1990-1991.

of the hearings one of the witnesses, a district vice-president assigned to department stores, who had negotiated with management prior to that time, stated to the committee: "We are in the midst of an eight-week strike at Hearns, and I was threatened that a committee would be brought in, and here it is * * *." [178]

C. The committee's procedure—a weapon in the exposure system.

Since the committee is not concerned with developing information concerning a particular subject matter but rather with conducting ideological warfare through the use of the exposure system, its procedures are devised so as to afford it the greatest opportunity for pursuing, attacking and punishing the witnesses whose political views and affiliations are distasteful to it. The procedural consequences of the committee's function are its Janus-faced standards depending upon whether the witness is friendly or hostile.

1. The committee's double procedural standards.

Hostile and friendly witnesses are accorded distinctly different treatment. The friendly witness is greeted with warmth and respect. He is allowed and encouraged to testify at length and the committee is gratified to hear his opinion on any subject. He is aided and inspired to make charges and cast suspicion on others.[179] His answers to questions may be rambling, irrelevant or stupid—but they are welcome and lavishly praised. And no wonder, for he shares the committee's premises, supports its charges, confirms its suspicions and provides it with more names to be exposed.

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[178] *Ibid.*, 1987.

[179] E.g., "Do you know, as a matter of fact, that Rabbi Frahm does not have communistic tendencies?" 3 *Investigation* 2230.

The hostile witness, on the other hand, is stringently limited in his answers to the precise information sought by the interrogator and may not volunteer or elaborate any answers. He is often compelled to give a "yes" or "no" answer to difficult questions. The committee treats him with coldness and hostility, and frequently tries to entrap him. That he should be so treated is not surprising since he is summoned primarily to confess under oath that he is a "subversive," so that his exposure may be complete.

The double standard maintained by the committee was implicitly recognized in one of its reports:

> "In dealing with groups and individuals that engage in this subversive conspiracy, the committee has the difficult task of pursuing its inquiry through regulations and procedures which, when formulated, were meant to apply only to law-abiding citizens of the country." [180]

And in a recent statement:

> "This committee has no desire to persecute anyone, certainly not those who see fit to cooperate with the committee * * *." [181]

Thus, the hostile witness is hurried, but the committee does not tire of friendly witnesses. In reply to a question,

> "Did the severance of your connection with the party occur suddenly or was it a type of action that took some time to develop?"

the witness answered with two full printed pages of rambling discourse, including a recommended reading list for Communist Party members seeking a way out of the Party, and descriptions of the disillusionment of other ex-Communists. The committee showed no reluctance at all to listen to the lengthy and generally irrelevant testimony.[182]

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[180] *Interim Report on Espionage* (1948) 2.

[181] 3 *Los Angeles Professional Groups* (1952) 4089.

[182] 4 *Motion Picture Industry* (1951) 1441-1442. See also *ibid.*, 1444-1445.

The committee's insistence on yes or no answers is peculiarly limited to hostile witnesses, and includes situations where such answers are impossible. One witness, for example, was asked a question which described in detail the manner in which the witness was fired from a job, and then asked:

> "Now, is that not exactly what happened?
>
> * * * * * *
>
> Dr. Pennes: Mr. Walter, I would like to answer that.
> Mr. Walter: You can answer it 'yes' or 'no.'
> Dr. Pennes: I will tell you what happened.
> Mr. Walter: Just answer whether that happened.
> Dr. Pennes: That is not what happened, and what happened was that she said——
> Mr. Walter: You have already told us, and I am asking you, and you said, 'No, that did not happen.'
> Dr. Pennes: That is not what happened."

No further testimony was allowed on that question.[183]

For a friendly witness, however, there are no such limitations. One witness, replying to a question, stated that he would have "to make an observation" in order to clarify his answer. He was told, "I want you to, whatever your observation is." [184] But a hostile witness who sought to make an observation was curtly cut off.[185]

Hostile witnesses are continually interrupted in their testimony.[186] But the friendly witnesses are invited to fill the record with their observations. One witness, for example, was asked, "Do you have anything further you desire to say with regard to the circumstances under which you

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[183] 4 *Los Angeles Professional Groups* (1952) 4123. See also *ibid.*, 4128.

[184] 4 *Motion Picture Industry* (1951) 1453.

[185] *McMichael* (1953) 80, 244.

[186] 4 *Los Angeles Professional Groups* (1952) 4116-4117.

severed your connections with the Communist Party, or have you explained that as fully as you desire?" [187]

The friendly witness is assisted in his testimony by a series of leading questions to guarantee that the information the committee desires will be entered in the record. The witness cooperates merely by assenting to the correctness of the question. One witness "testified" as follows:

> "Mr. Tavenner: Well, by suspicion do you mean the rank and file members of the union would have objected to the use of its facilities for holding of Communist Party meetings, if they had known the true purpose?
> Mr. Lundgren: That is correct.
> Mr. Tavenner: Then does that mean that the members of the Communist Party endeavored to conceal their Communist Party membership from the rank and file of the union which they were attempting to lead?
> Mr. Lundgren: Absolutely; yes.
> Mr. Tavenner: And because of the danger of exposing the Communist influence that was being brought to bear upon the union, you decided not to hold any further meetings in the union hall?
> Mr. Lundgren: That is right." [188]

The leading question is used towards a hostile witness, however, in the same manner in which it is used at a trial on cross-examination. One witness, for example, after the committee had named a certain individual as a "subversive," was asked:

> "Mr. Kunzig: You know he is a good friend of yours; is that right?
> Bishop Oxnam: Just a minute. Don't put answers in my mouth, please.
> Mr. Kunzig: Just answer the question." [189]

Affirmative evidence offered by witnesses unfriendly to the committee is not welcome. One witness, for example,

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[187] 4 *Motion Picture Industry* (1951) 1443.

[188] 1 *Chicago Area* (1952) 3628.

[189] *G. Bromley Oxnam* (1953) 123.

sought to testify that the accusing witness had committed perjury, and was met with this response:

> "Mr. Tormey: What he [Philbrick] testified here was in contradiction to what he testified at Foley Square.
>
> Mr. Wood: That was not the question that was asked you.
>
> * * * * * *
>
> Mr. Forer [attorney]: * * * the witness has been trying to give a comment on the testimony that was given by Mr. Philbrick, a factual comment * * *.
>
> Mr. Tavenner: I haven't asked him any question to which that would be responsive.
>
> Mr. Forer: I think that is something which the committee should be interested in. * * * It is a question of evidence and of Philbrick's having committed perjury before this committee, and I think the committee should want to hear that.
>
> Mr. Tavenner: If it is a matter of record, as you indicate, the committee certainly would have possession of it." [190]

While the committee is pleased to hear the opinions of witnesses who will praise its work, it is not interested in the opinions of even the cooperative witnesses, if such opinions are critical. Thus, Bishop Oxnam at one point was told by Congressman Walter:

> "Now, let's not criticize the committee * * * every time you are asked a question." [191]

Friendly witnesses present their stories to the committee as fulsomely as they desire, but hostile witnesses are not allowed as of right to read a statement before the committee.[192] The committee will sometimes add a written state-

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[190] *Massachusetts* (1951) 1381.

[191] *G. Bromley Oxnam* (1953) 116.

[192] 1 *Motion Picture Industry* (1951) 112-114; *Gerhart Eisler* (1947) 2.

ment to the record, but without permitting it to be read. It has even withdrawn previously granted permission to read a statement at the end of "uncooperative" testimony.[193]

Since the friendly witness has no occasion to appeal for procedural protection, the insistence upon procedural rights is itself deemed to be suspicious. Witnesses are thus admonished that the exercise of their legal rights in the same way as Communists warrants the conclusion that the witness is a Communist also. In one instance, after a witness invoked the Fifth Amendment, but confounded the committee by appearing not to be a Communist, he was advised:

> "* * * that is literally a fact, that the known Communists answer just like you have answered, when it comes to the border line of any Communist activities. In other words, when the men that we know would use force of one kind or another to change our form of government answer these questions, they answer just like you have."[194]

2. Right to counsel.

Each witness is theoretically permitted to appear accompanied by counsel and to consult with counsel on his constitutional rights before answering questions. The committee characteristically distorts this right into a weapon against the witness.[195]

Generally, friendly witnesses appear without counsel and hostile witnesses with counsel. Thus, the witness accompanied by counsel is immediately suspect. When Eric Johnston appeared before the committee, the following colloquy occurred:

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[193] 2 *District of Columbia Area* (1950) 3269.

[194] 3 *Motion Picture Industry* (1951) 708.

[195] Counsel for Bishop Oxnam called representation at these hearings a "fraud on the public" because he had been warned that if he spoke he would be ejected. *New York Times*, Nov. 23, 1953.

"Mr. Stripling: Mr. Johnston, are you represented by counsel?

Mr. Johnston: I am.

Mr. Stripling: Do you desire counsel?

Mr. Johnston: Mr. McNutt has been hired by the Motion Picture Association. He is here with me.

Mr. Stripling: As a witness, do you desire counsel?

Mr. Johnston: As a witness, I do not need counsel.

Mr. Stripling: For what purpose will Mr. McNutt serve?

Mr. Johnston: Mr. McNutt represents the association. I think it is wise for him to stay here with me.

Mr. Stripling: You are the witness.

Mr. Johnston: That is right.

Mr. Stripling: And you don't desire counsel yourself?

Mr. Johnston: No.

The Chairman: Well, if he would feel any better by having Mr. McNutt next to him, why, it will be all right for Mr. McNutt to sit next to him." [196]

But the witness who testifies without counsel is praised. When Lauchlin Currie appeared, Congressman Mundt told the committee:

"* * * I would like to have the record show that Mr. Currie, in addition to having answered questions in a forthright manner, came here without benefit of counsel to whisper in his ear the answers he should give to the committee. I think that is very commendable." [197]

The committee seeks to curtail consultation with attorneys by having each conference noted in the record.[198] Since these notations do not contribute to the committee's store of information, the only reason for them must be to cast suspicion on any answer given after such consultations.

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[196] *Motion Picture Industry* (1947) 304-305. See also *McMichael* (1953) 5.

[197] *Espionage in Government* (1948) 875.

[198] See, e.g., 4 *Infiltration—Education* (1953) 1110 ff.; 3 *Baltimore Area* (1951) 1004.

Where a witness freely avails himself of the advice of counsel, the committee has complained.

> "The Chairman: Now, the record will show that the witness, after almost every question, has referred to his counsel, and I say to both the witness and to counsel that we have got a great many questions to ask. We will expect answers, and the witness can answer of his own free will and accord. He doesn't have to get advice on every single question." [199]

Testimony given after consultation seems, in the committee's view, to lack the probative value of testimony given without such consultation. A witness answering after being advised is open to the charge that the answer is his lawyer's, and not his.

> "I noticed you did not answer that question until you first had consulted with counsel.
>
> "Now, I am asking you, is your answer that you just gave the result of your conference with counsel, which you have the right to have, or is it your own independent opinion * * *?" [200]

A committee which pries into the personal, ideological and organizational details of every witness' life does not hesitate to inquire as to the nature of attorney-client conferences. One witness was asked: "What did your counsel advise you?" "I want to find out whether your lawyer told you that the chairman's question was pertinent or not pertinent." "Did your lawyer tell you that the question was pertinent or not pertinent?" [201]

The right to counsel is further limited by the committee's refusal to permit its exercise on certain occasions. One witness, after asking, "May I consult with counsel?", was

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[199] *Excerpts from Atom Bomb Hearings* (1948) 3-4.

[200] 1 *Baltimore Area* (1951) 802; *Joint Anti-Fascist Refugee Committee* (1946) 40-41.

[201] *Joint Anti-Fascist Refugee Committee* (1946) 22-23.

told, "Not on this question," [202] and, "You know the answer to that question, don't you?" [203] Another witness, making the same request, was answered, "You don't need to, I am not going to ask you any legal questions." [204]

The committee has further attacked the right to counsel by directly intimidating counsel during hearings. In the first Hollywood hearings, the committee interrupted the questioning of a witness to call his lawyer to the stand and questioned him under oath concerning a newspaper article on the way he was advising clients. When the attorney pleaded the attorney-client relationship, the committee threateningly read him the federal conspiracy act.[205]

On another occasion an attorney was called to testify in the midst of his client's testimony. Upon his refusal to be sworn, the committee subpoened him, and asked if he were a Communist and whether he had been put in contact with his client through the Communist Party.[206]

The committee itself gratuitously advises witnesses as to their legal rights before it. After invoking the Fifth Amendment to a committee question, one witness was told by Congressman Walter:

> "Let me give you some worth while legal advice. You couldn't possibly be prosecuted for answering that question." [207]

If counsel consults with his client, he runs the risk of being charged with "coaching the witness." Nor may he

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[202] *Ibid.*, 9.

[203] *Ibid.*, 10-11.

[204] *Ibid.*, 40.

[205] *Motion Picture Industry* (1947) 367 ff.

[206] *Espionage in Government* (1948) 1215-1216, 1342-1346. See also, *Hanns Eisler* (1947) 158; *Labor Unions* (1947) 109, 122-123.

[207] 2 *Chicago Area* (1952) 3817.

reply to such charge since the committee rules forbid him to address it.[208]

3. The right of the witness to defend himself.

The witness is not advised in advance of his appearance of the charges that have been made against him or the reason why his presence is required. Thus, at one hearing, the witness was faced with testimony given in executive session, not made public, and not available for examination to him or his counsel.[209] Another witness complained to the committee:

> "When subpoenaed I immediately wrote * * * requesting that you forward me a transcript of Mr. Judson's testimony and the testimony of any other witnesses before the committee who might have made allegations about me.
>
> "Not until yesterday did I receive a reply * * * it did not contain a transcript of Mr. Judson's testimony, but merely a few sentences excerpted from it. I was unable then to learn and still don't know * * * what Mr. Judson said that might affect me * * *.
>
> "Moreover, when I requested a postponement of this hearing it was denied me * * * on the ground that I was being called as a witness on a specific day to confront another witness who would also name me.
>
> "I asked then who this witness was so that I might have some notice of the nature and character of the accuser and the accusation and have a chance to refresh my recollection about what association I might have had with this person, if I had had any * * *.

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[208] See *McMichael* (1953) 257-261 and Rule X of the committee's rules.

[209] 4 *Los Angeles Professional Groups* (1952) 4121. The committee rules (Rule X) provide for notice to a person named only (a) where practicable, (b) the hearing was public [this apparently enables the committee to hear charges in private session and leak them to the press without notice to the individual affected, see, e.g., *McMichael* 80-83], and (c) the individual was not previously named.

"Such notice was again denied me * * *." [210]

The witness may not cross-examine his accusers,[211] even though the committee will interrupt his testimony in order to place them on the stand and make their accusations directly.[212] While the committee does offer the "accused" a right to come before it and "clear" himself when the individual is ready to confess, it is far more reluctant to do so where the purpose is refutation. Thus, when Heywood Broun appeared to defend himself, the committee allowed him a few minutes to read a prepared statement and then hustled him off the stand.[213] Two unions, attacked before the committee, were denied an opportunity to clear themselves before it.[214] Dr. Edward U. Condon had to wait out a prolonged smear before the committee finally deigned to allow his appearance.[215]

When Bishop Oxnam appeared before the committee, another individual was named as a communist. Bishop Oxnam protested:

> "* * * Did he have any opportunity to answer that? * * * did he have a chance to answer what was alleged? * * *."
>
> "This is given to the public all over the nation before the man accused has had so much as an opportunity to answer."

The committee replied:

> "On the basis of the testimony we had in New York * * * how could any reasonable person come to any

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[210] 2 *Los Angeles Professional Groups* (1952) 3569. The same accusation was made by Charles Parlin, counsel for Bishop Oxnam. *New York Times*, Nov. 23, 1953.

[211] *McMichael* (1953) 102-103, 248-249.

[212] *Ibid.*, 337-376.

[213] 1 *Investigation* 938.

[214] 86 C. R. 601 (1940).

[215] Carr, *op. cit.*, 131-153.

other conclusion than that [these men] are dangerous Communists?" [216]

The committee's suppression of the right of the witness to defend himself is one of the oustanding procedural consequences of the exposure system.[217]

4. The role of the executive session in the exposure system.

Witnesses testifying at public hearings before the committee do not meet the committee for the first time. The

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[216] *G. Bromley Oxnam* (1953) 134.

[217] It can hardly be said that there are peculiarities of the congressional investigative function which require these procedural abuses. The hearing conducted pursuant to S. Res. 266, 74th Cong., 2d Sess., by a subcommittee of the Senate Committee on Education and Labor (Lafollette Committee), were highly controversial; nevertheless the committee respected the procedural rights and privacy interests of its witnesses. Thus, the committee asked the Pinkerton Agency to produce the names of its agents. Counsel for the agents objected on the ground that this information was not pertinent to the inquiry and that the request constituted an unconstitutional search and seizure in violation of the Fourth Amendment. The request was dropped. *Hearings*, 1446, 1733, 1760.

The committee took the position that counsel for any witness would be allowed to state any objections for the record. *Hearings*, 9075. Thereafter, counsel for the Ohio Rubber Company participated freely in the hearings, objecting to questions put to his client and to other witnesses, and putting questions of his own to the witnesses. *Hearings*, 9090-9091, 9100, 9104, 9117, 9125, 9144, 9150, 9162, 9174, 9177, 9186, 9198, 9199, 9208, 9219, 9225, 9239, 9242, 9244-9245, 9433, 9443-9444, 9449, 9450. So did counsel for Republic Steel Corporation, *Hearings*, 9993, 10077, 10160, 10430-10432, 10884, 10892, 10924, 11039, 13373-13375, as well as counsel for Balfour, Guthrie & Co., Ltd., *Hearings*, 17323, 17325-17326, 17330-17331.

Consistently throughout the hearing the committee followed the practice of allowing adverse witnesses to hear or read one another's testimony and then to appear in reply to it. A typical example appears at *Hearings*, 10953-11068. On one occasion counsel for Republic Steel Corporation protested that the committee had not called witnesses who would testify to the company's version of the facts. He supplied the names of such witnesses to the committee. Committee investigators then went to these witnesses, in the presence of counsel for the company, and took affidavits from them which were entered in the record of the hearings. *Hearings*, 10077, 10299-10300. See also Ogden, *op. cit.*, 102.

public hearing is often preceded by an executive hearing.[218] Similar questions are put to the witness.[219] A transcript is made. The only difference between the two hearings is the exclusion of the public from the executive hearing.

While it has become a practice to hear witnesses in executive session before holding the open session, the committee occasionally interrupts an open session to "go into executive session", and vice versa.

The routine executive session serves many purposes. It rehearses friendly witnesses. It tells the committee what questions hostile witnesses will answer and what they will not, thus affording the committee an opportunity to ask only the most damaging questions in open session. A witness reluctant to talk in open hearing can be cajoled to do so under the cover of the secret session, although the committee has the right to make the testimony public at its discretion. This is a particularly useful device for witnesses who are ashamed to name others as communists before the public.[220]

The committee will end an executive session and go into open hearings when it fears it will lose the publicity value of some especially sensational testimony. Thus, Bentley and Chambers started their testimony in executive session, but, as Stripling describes, after fifteen minutes of Chambers' testimony, one committee member interrupted:

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[218] 5 *New York City Area* (1953) 1970, 1981

[219] E.g., 2 *Infiltration—Education* (1953) 138. "I would like to ask the professor a question that I asked him yesterday." See also, *ibid.*, 164.

[220] See, for example, 1 *Motion Picture Industry* (1951) 78-111; *G. Bromley Oxnam* (1953) 128 (witness need not name source of information that a person is a Communist in open session); 3 *Radiation Laboratory* (1950) 3455; *Communist Press* (1952) 2304 ("You would not have any hesitation in giving the names of your counselors in executive session, would you?").

"Hell, why is this in executive session? This should be in the open." [221]

* * * * * *

The short of the matter is that the witness who is unwilling to collaborate in his exposure comes to the committee with no rights at all. "The rights you have," said Chairman Thomas when he directed counsel for a witness to testify and counsel insisted that he in turn had a right to counsel, "are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee." [222]

D. The committee as a repressive, illegal and partisan governmental power system.

1. The committee as super-legislature, detective agency, prosecutor and court.

In examining the activities of the committee, one is struck by the curious fact that, on the one hand, the committee's activities in the legislative sphere are and have been extremely limited, and, on the other hand, it has functioned most actively, if not exclusively, in areas confided to other branches of the government.

During the committee's first seven years of existence no bills were referred to it since it was only a special committee. The published works of the committee for this period include about 10,380 pages of public hearings in 17 volumes; 3,609 pages of executive hearings in 7 volumes; 2,268 pages of appendices in 8 volumes; and 15 reports totalling 522 pages, only one of which contained recommendations for legislation.

Despite this prodigious activity, only one bill introduced by a member of the committee during this period became

[221] Stripling, *The Red Plot Against America* (1949) 100. For another example of manipulation of open and executive sessions, see 1 *Los Angeles Professional Groups* (1952) 2688-2689.

[222] *Espionage in the Government* (1948) 1310.

law.[223] The only other legislation passed in this period for which the committee was indirectly responsible was a series of riders attached to appropriation bills denying federal employment to those who advocate the overthrow of the government,[224] and a provision attached to an appropriation bill,[225] declared unconstitutional as a bill of attainder.[226]

During the committee's existence as a standing committee no significant change occurred. For the period up through the end of 1952 the committee published 11,743 pages of hearings, both executive and public in 87 volumes, only three of which dealt with proposed legislation; 9 volumes of miscellaneous publications totalling 395 pages; 29 reports totalling 1801 pages; various anti-subversive guides amounting to 352 pages; and compilations of court opinions and excerpts from hearings amounting to 112 pages.

However, the legislative accomplishments of the committee for this period were slight when measured against the total of the committee's activities. The committee held hearings on proposed legislation for the first time in 1947. At that time the committee devoted five days to hearings on H. Res. 1884 and H. Res. 2122. In 1948 it again held hearings on proposed legislation. Seven days were devoted to hearings on H. Res. 4422 and H. Res. 4581 which led to the drafting and reporting of the Mundt-Nixon Bill which was introduced as H. Res. 5852. The last and third hearings on proposed legislation came in 1950 when ten days were devoted to two "Internal Security" bills: H. R. 7595 (a revised version of the Mundt-Nixon Bill) and H. R. 9903. As a result of these hearings, the committee reported

[223] 54 Stat. 1201, 18 U. S. C. sections 14-17 (1940).

[224] See *United States* v. *Lovett*, *supra*, 308.

[225] Section 304 of the Urgent Deficiency Appropriation Act of 1943.

[226] *United States* v. *Lovett*, *supra*, 309-312.

favorably upon a new bill drafted in committee, H. R. 9490, which was passed by the House and absorbed into the McCarran Bill in the Senate which was enacted into law as the Internal Security Act of 1950 over a veto by the President.

The only other legislative accomplishment of the committee was the incorporation of many of its recommendations regarding security against "subversive" aliens into the McCarran-Walter Immigration Bill. It is manifest that the stubby tail, "legislation," wags the enormous dog, "exposure."

The committee really functions as a super-legislature creating political offenses in areas constitutionally barred to Congress. It has created the high crime of being a subversive or Communist, as well as petty political crimes, until by now it has defined a wide spectrum of shades or degrees of political wrongdoers—the "fronter", the "dupe", the "fellow traveler", the "supporter of Communist causes", etc.

The committee spends all of its time policing the crimes which it has thus created and punishing through its own unique sanction, exposure, those whom it finds guilty. This aspect of its activity combines the functions of a governmental police force, a grand jury and a court.

Some of the committee's activities resemble the filing and investigative techniques of the FBI. It takes the evidence which it receives from its investigators, uses its process to subpoena and interrogate the accused and either dismisses him or recommends punishment, including indictment. Thus it performs functions resembling those of a grand jury.

The committee [illegible] itself as a body authorized to exercise powers w[illegible]held from the FBI or the grand jury.[227]

[227] *Interim Report on Espionage* (1948) 1-2.

Thus, while the FBI can accumulate facts, it cannot disclose them; the committee does both. While a grand jury finds facts, it must do so in secrecy in order to protect those who are deemed innocent until found guilty. The committee publicizes its information before, during and after the fact determination is made. The grand jury is subject to the Attorney General's decision as to what evidence comes before it and what action will be sought; the only limitation on the scope of the committee's activity is its own subjective prejudices. It reveals its evidence freely and without evaluation or verification, and makes its decision as to guilt or innocence with a finality far exceeding that of a presentment or indictment.[228]

In its own words, the committee is a "'grand jury' in session to investigate un-American activities at all times." [229] The committee's hope in the espionage hearings, for example, was "that by diligently pursuing its activities in this case our committee * * * will secure further indictments or confessions * * *." [230]

As a grand jury, the committee has made many recommendations that certain individuals be prosecuted for violation of law. Thus, it urged deportation proceedings against Harry Bridges under the immigration and naturalization laws.[231] It informed the Department of Justice that it had established "a clear prima facie case" against Gerhart Eisler for "1. contempt of Congress. 2. perjury. 3. conspiracy to overthrow the government. 4. income tax evasion. 5. falsification of passport". [232] The committee also claims credit for the prosecution of Browder and

[228] *Ibid.*; criticism of Congressman Keller, 84 C. R. 1109 (1939).

[229] 91 C. R. 275 (1945) (Mr. Rankin); see also, 91 C. R. A4456 (1945), 93 C. R. 1131 (1947); *Espionage in the Government* (1948) 537; *Eugene Dennis* (1947) 13, 14.

[230] *Soviet Espionage Report* (1948) 11.

[231] 76th Cong., 1st Sess., H. Rept. 2 (1939) 88-89.

[232] *Gerhart Eisler* (1947) 35.

others on passport fraud and other charges,[233] and "for sending Alger Hiss to prison".[234] The committee has stated that a subpoena is considered by members of the public "as the equivalent of a statement of charges or a warrant of arrest for the person served".[235]

A member of the committee has referred to it as "the greatest open court in the country".[236] Like a court, it makes findings of guilt or innocence, and like the ancient ecclesiastical tribunals it proceeds by oath *ex officio* to try the political orthodoxy of its victims. As in the case of resistance to the test oath, the committee subjects the witnesses which it condemns to civil disabilities, such as loss of employment, and public condemnation. In addition, the witness who is unwilling thus to acquiesce in an enforced confession of "subversion" is subject to the contempt sanctions of Section 192, a statute which was passed for the altogether different purpose of eliminating obstructions to the legislative process.

The committee weighs conflicting evidence[237] and brings witnesses face to face or confronts them with accusations demanding affirmation or denial.[238] The committee decides the guilt or innocence of organizations and individuals. One organization, for example, was handled in this way:

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[233] E.g., 10 *Investigation* 6353; *Motion Picture Industry* (1947) 328; *Gerhart Eisler* (1947) 13; Carr, *op. cit.*, 275-276; Thomas, *op. cit.*, 5; 86 C. R. 578 (1940).

[234] 4 *Los Angeles Professional Groups* (1952) 4161.

[235] *Annual Report*, 1951, 4-5; committee hearings do result in outright charges. One witness was told by the chairman, "I am accusing you of being a Communist. Is that true or not?" 4 *Los Angeles Professional Groups* (1952) 4128.

[236] *Espionage in the Government* (1948) 846. See also *ibid.*, 847, 892, 926.

[237] *Soviet Espionage Report* (1948) 2 ("* * * the confrontation of the two men * * * has definitely shifted the burden of proof from Chambers to Hiss * * *."). See also, 3 *Investigation* (*Exec.*) 1400; 14 *Investigation* 8164-8230.

[238] 1 *Infiltration—Labor Unions* (1949) 603.

> "* * * this congressional committee found that this organization and others were controlled by the Communist Party. The evidence then obtained and obtained since by the committee demonstrates that fact, and there can be no further controversy as to the parentage of this organization * * *." [239]

In dealing with Professor Frederick L. Schuman, the committee announced:

> "We will have all of them [Prof. Schuman's articles] before us and we will undertake to pass on them. Whatever judgment the committee will pass on them you may rest assured will be in the light of all the circumstances." [240]

Sometimes the committee is stricken with doubt:

> "I can't, in my own mind, reach the conclusion that Mr. March was a member of the Communist Party." [241]

In one instance the witness stated he was not now a Communist, but invoked the Fifth Amendment as to prior membership. Congressman Velde commented:

> "Personally, I can only draw one inference from the manner in which you have testified, and that is that you * * * continue to be a member of the Communist Party." [242]

One witness stated to the committee, "That is the same as saying, I believe that this committee considers you guilty." Mr. Walter replied, "Yes, we do. At least I do." [243]

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[239] 9 *Investigation* 5508. See also, *The Honolulu Record Report* (1950) 12; *Review of Methodist Federation for Social Action* (1952) 68-69.

[240] 7 *Investigation* (*Exec.*) 3147.

[241] 3 *Investigation* (*Exec.*) 1412.

[242] 2 *Los Angeles Professional Groups* (1952) 3573. See also, *Massachusetts* (1951) 1367.

[243] 3 *Infiltration—Education* (1953) 998. See also, *New York Times*, Dec. 11, 1948, Mundt: "* * * we shall continue to try to discover, to disclose and to *punish* disloyal employees" (emphasis added); 6 *Investigation* (*Exec.*) 2916.

The committee not only punishes the political wrongdoer; it aso clears repentant political sinners. It is the policy of the committee to give persons who have been the subject of testimony before it an opportunity to appear, "to deny admit or explain such sworn accusations".[244] Many hearings are devoted exclusively to witnesses who testify that they are no longer Communists, fronters, dupes and the like. Edward G. Robinson not only has testified twice; he has also given the committee for publication in its hearings a complete statement on all contributions he had ever made to organizations.[245]

The committee has even gone so far as to allow itself to be used as a means of clearance by a person who had not been attacked before it, but who had been "adversely mentioned in publications throughout the country."[246] The committee's clearance procedures have been heavily resorted to by individuals whose livelihood and earning capacity depend upon their public reputation, as for example those employed in the entertainment field. Where the person whose political reputation is suspect is a valuable "property" in the theatrical sense, the clearance is staged with elaborate publicity and the anxious cooperation of those whose economic interests are threatened. The committee's judgment of absolution in such cases is

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[244] 3 *Los Angeles Professional Groups* (1952) 3939. See also, 1 *Los Angeles Professional Groups* (1952) 2486; *Testimony of Edward G. Robinson* (1950) 3299; 2 *Hawaii* (1950) 1584; *Interim Report on Espionage* (1948) 3.

[245] *Testimony of Edward G. Robinson* (1950) and 7 *Motion Picture Industry* (1952) 2415.

[246] *Testimony of Hazel Scott Powell* (1950) 3611. Mrs. Powell, a Congressman's wife, received prompt attention from the committee. But others have to wait longer to obtain absolution. Musician Artie Shaw complained: "We have all this * * * haze of rumor started about me. * * * about three years ago it began to affect me as a citizen very seriously. * * * I have had to wait three years to ask to appear before this committee so I can clear myself * * *." 1 *New York City Area* (1953) 1188-1189. See also, 3 *Minority Groups* (1950), *Testimony of "Josh White"*; 1 *Motion Picture Industry* (1951) 256-257; *G. Bromley Oxnam*, 40 ff.

given widespread publicity so as to eliminate any pre-existing political taint.[247]

In view of the fact that a large proportion of the 35,000 names in the committee's Index are persons who have been "named" before the committee, the committee's "clearance" procedure may well develop into a highly significant aspect of its work. One witness, as a matter of fact, saw the committee as nothing but a clearance forum.

> "Mr. Doyle: * * * Do you feel, then, that this committee * * * is serving a valuable function to meet this problem [communism]?
>
> Mr. Collins: Well, it has served a valuable function as far as I am concerned in that it has given me an opportunity to clear myself, and it gives that possibility to other people. Insofar as its other activities, I * * * am not familiar enough with it." [248]

The committee's continued emphasis upon the fact that a person named may appear to clear himself carries with it the disturbing implication that if he does not, he cannot be properly cleansed. This was stated explicitly by Chairman Wood, who told a witness:

> "Your presence before this committee is the best form that I know of for you to relieve yourself of any smear or blacklist." [249]

A disturbing by-product of the necessity of a "clearance" to rub off a smear is the increasing amount of correspondence the committee receives from persons bearing similar or the same names as persons named and mistaken for them. These persons, subjected to suspicion and harass-

[247] The most recent application of this full-scale clearance treatment is the case of Lucille Ball, who found it necessary to use the committee as a forum for explaining that a political aberration of her youth resulted from the folly of indulging the political whims of a now-dead grandfather. *New York Times*, Sept. 13, 1953.

[248] 1 *Motion Picture Industry* (1951) 256-257

[249] 4 *Motion Picture Industry* (1951) 1506

ment, write the committee denying any connection with the individual named; the committee duly enters the "clearance" in the record, but "cannot undertake * * *" to vouch for the facts of the case."[250]

2. The committee's conflicts and competition with other governmental agencies.

Since the committee has functioned largely in areas for which other agencies of government have primary responsibility, it is not surprising that it is in constant conflict with them. Once the committee has stalked its prey, the mere fact that a loyalty board is examining the record of the individual or has reached a decision becomes irrelevant. Thus, the committee published a report on Dr. Edward U. Condon, director of the National Bureau of Standards, at a time when it was aware that the Atomic Energy Commission was still investigating him, and had not yet made its final judgment.[251] Four and a half months after the publication of the subcommittee's unsubstantiated finding that Condon was "one of the weakest links in our atomic security," the AEC made public a report giving Condon security clearance.[252] The disgruntled committee retaliated by using its subpoena powers against officials of the Department of Commerce, who refused to testify concerning the clearance or give the department records on the case.[253]

[250] 3 *Los Angeles Area* (1953) 642. For illustrations of many such disclaimers, see *ibid.*, 640-641; 2 *Los Angeles Area* (1953) 439, 465, 469, 584, 588; 4 *Los Angeles Area* (1953) 784, 840; *Cincinnati Area* (1950) 2823.

[251] *Report of Subcommittee on National Security*; see also Carr, *op. cit.*, 131-153.

[252] 94 C. R. 9547 (1949).

[253] Carr, *op. cit.*, 150. Prof. Carr says of the committee's behavior in this instance (at 138): "Its own independent action on March 1 was not only an improper effort by a legislative body to usurp a duty assigned by law to an administrative agency and in this instance in the process of being performed, but was also an attempt to turn the fact that the AEC had not yet completed its investigation of Dr. Condon or passed final judgment upon him into a finding of guilty against him."

Committee-FBI conflict has been a serious problem from the outset of the committee's activities. At one time Attorney General (now Mr. Justice) Jackson accused the committee of undermining public confidence in the bureau, hampering and duplicating its work, and using witnesses which the FBI had determined to be thoroughly unreliable.[254]

In its *Report on Soviet Espionage Activities in Connection with the Atom Bomb* (1948), the committee charged that the evidence it uncovered was in FBI files and before the Attorney General.

> "The committee believes it important that the American people be apprised of those facts by someone. Since the executive has refused to permit anyone connected with the executive branch of the government to make disclosure thereof, the committee considers it its duty to do so" (at 165).

The evidence acquired through committee investigation had already been gathered by the FBI, the Manhattan Engineering District, and the armed forces intelligence units.[255] The executive branch of the government had determined as a matter of policy not to reveal what information it had to the public. The committee, however, requires publicity to sustain its work and therefore the very silence of the executive was a reason for publicizing the information.

The committee has likewise competed with the federal grand jury. In the 1948 espionage hearings, the committee entered a field already being examined by a federal grand jury which had been sitting for more than a year, and which was hearing witnesses on communism in the government. Both groups subpoenaed the same witnesses, and raced to hear them first. The committee carried the competition so far as to resist for a week the grand jury's re-

[254] *New York Times*, Nov. 24, 1940; 86 C. R. 13768-13769 (1940).

[255] Carr, *op. cit.*, 174.

quest for documents it had received.[256] Subsequently the grand jury reported in its presentment that the large number of witnesses pleading the privilege against self-incrimination had done so because publicized charges and counter-charges of "other investigating bodies" had "alerted" them to the circumstances which the grand jury must examine in secrecy. It concluded: " * * * the grand jury recommends that all investigating bodies conduct their inquiries into espionage in secret."[257] If the committee ever weighed the necessity of secrecy of the grand jury against its own need for headline sustenance, the result is apparent. When the grand jury recessed without any indictments, "the committee felt compelled to bring to the attention of the American people the information that it had before it."[258]

The committee frequently clashes with the executive on the issue of making information public and opening to the committee files in possession of the executive.[259] The conflict over access to the executive department's files is a manifestation of a continuing competition with the executive for the right to determine national policy in the area of "subversion."[260]

3. The committee as a partisan political agency.

The committee plays an aggressive role in the political arena. From the beginning, the committee has exploited charges of "subversion" among government employees as a partisan political instrument. Every controversial New

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[256] *New York Times*, Dec. 11, 1948; Carr, *op. cit.*, 276-277.

[257] *New York Times*, Apr. 27, 1949.

[258] *Interim Report on Espionage* (1948) 7-8.

[259] E.g., *Report on Soviet Espionage Activities in Connection with the Atom Bomb* (1948) 162, 184.

[260] The committee, of course, is now engaged in serious rivalry with other congressional anti-subversive committees as its conduct in connection with the White matter demonstrates.

Deal program was fought by the committee by attacking the loyalty of government personnel. More recently, this emphasis has been strengthened.[261] The partisanship of the committee in this area was exposed by the recent issuance of subpoenas by the chairman of the committee, without consulting its members, upon former President Truman, Governor Byrnes, General Vaughan and Mr. Justice Clark in connection with the Harry Dexter White case. The revealing statements of Representative Francis E. Walter in this matter were reported in the *New York Times* of November 11, 1953:[262]

> "Representative Walter said that Mr. Kunzig [committee counsel] told three Democrats about the subpoenas for Messrs. Truman and Byrnes after they had been issued. He first told them about the plans for questioning General Vaughan at a joint session to provide 'a more juicy hearing,' then, according to Mr. Walter, the staff member added:
>
> 'Hold on to your seats, gentlemen, while I tell you about two other subpoenas we have out. One is for Governor Byrnes and the other is for former President Truman.'
>
> He said Mr. Kunzig regretted the Senate committee had reached General Vaughan first and expressed belief that 'we should get in the act.'
>
> The Republicans apparently are planning closed hearings, but the Democrats said they would argue for open hearings, with live television permitted, 'so the people may know what is going on.'
>
> While Mr. Walter said that the House committee had sent a process server by plane to South Carolina 'to beat the Senate to the punch,' for Governor Byrnes, the Senate subcommittee announced it had concluded ar-

[261] See, e.g., 2 *Infiltration—Education* (1953) 215; Carr, *op. cit.*, 86; 9 *Investigation* 5685.

[262] Congressman Walter termed the issuance of the subpoena on the former President as the "most incredible, insulting, un-American thing that I have encountered in my twenty-one years in Congress." The use by the Congressman, a veteran of the House committee, of the term "un-American" in this connection merely emphasizes what we have been saying throughout, that this term is wholly subjective.

> rangements for the South Carolina executive to answer a series of questions in writing without appearing personally."

The history of the committee in relation to the Roosevelt and Truman administrations was neatly described by chairman Thomas to committee member Rankin:

> "We have been unearthing your New Dealers for two years, and for eight years before that." [263]

This "unearthing" of the New Deal began in the committee's first year. Congressman Thomas, just before the 1938 elections, delivered a radio talk linking the New Deal and communist programs.[264] At hearings prior to that election, the National Labor Relations Board was under attack, and the administration's labor program was identified with communism because the Communists were supporting it.[265]

The hearings regarding the Office of Price Administration in 1945 coincided with the consideration by the House of a bill renewing OPA legislation,[266] and the stated goal—subversive radio scripts—was put aside frequently in order to delve into the OPA itself.[267] The Hollywood motion picture probe resulted in the unsupported allegation that the White House had sought to have Hollywood produce pro-Soviet films and had actually used coercion to that end.[268]

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[263] *Espionage in the Government* (1948) 548.

[264] *New York Times*, Oct. 15, 1938. "The plan is to sabotage the capitalistic system by placing upon that system burdens of restrictive legislation and staggering taxation."

[265] 3 *Investigation* 2173, 2199-2200. See also 84 C. R. 1108 (1939).

[266] Carr, *op. cit.*, 24; *Office of Price Administration* (1945) 1-2.

[267] *Office of Price Administration, passim*, especially Bowles testimony.

[268] *Motion Picture Industry* (1947) 33-35, 39, 80-81, 166.

The committee has directly intervened in national and local elections. It recently conducted hearings in Los Angeles, "to find out to what extent the Communist Party in the city of Los Angeles is attempting to influence the coming elections for the board of education in this city."[269] The committee summoned witnesses known to be hostile to it, and after thorough questioning on their associations, beliefs, and political past, attempted to link them to one of the organizations participating in the election campaign. The committee charged "that almost every known Communist, every known fellow traveler * * * is in one way or another connected with one or another of these organizations."[270] Irreparable prejudice was created when, in the confusion as to the names of the school organizations he was attacking, Congressman Jackson opened many of them to public suspicion of subversion. He was required to "clear" publicly the offended groups.[271]

The committee entered the 1944 national elections with a hearing on the CIO Political Action Committee and the charge that it was a Communist organization in an open attempt to discredit the liberal supporters of the Democratic Party.[272] The committee similarly entered the gubernatorial race in Michigan in October, 1938, when it sought to discredit Governor (later Mr. Justice) Murphy by linking him with communists.[273] In Minnesota it performed a similar role.[274]

The committee knows how to use its powers not merely to influence the political campaigns of others but to further the political ambitions of committee members. The pub-

[269] 3 *Los Angeles Area* (1953) 620.

[270] *Ibid.*, 622.

[271] *Ibid.*, 667, 687.

[272] 17 *Investigation* 10211.

[273] 2 *Investigation* 1487 ff.

[274] *Ibid.*, 1359 ff. See also 84 C. R. 1109-1110 (1939). For similar tactics in California see 3 *Investigation* 2034; 84 C. R. 1121 (1939).

licity which the chairman and members receive is valuable political capital. Thus committee members who need political help either for re-election, to pay off a political score, or to advance their Senatorial ambitions, will find the committee most cooperative.

The committee has already conducted investigations in areas located in the home states of seven of its nine members.[275] Of the fourteen geographical areas investigated to date by the committee, eleven have been in the home states of members of the committee at that time. This correlation between the locale of the investigation and the home states of the committee members has resulted in numerous opportunities for the local man to shine at the local investigation by presiding as chairman of the investigating subcommittee.

Thus, the Columbus investigation was presided over by Representative Scherer of Columbus, Ohio.[276] The Philadelphia and western Pennsylvania investigations were conducted by Representative Walter of Pennsylvania.[277] The Albany hearings were held with Representative Kearney of New York presiding.[278] The investigation of aircraft defense industry in Southern California was presided over by Representative Voorhis of California, the only committee member present.[279] The motion picture investigation in Los Angeles was conducted at times with Representative Donald Jackson of California as a subcommittee of one.[280]

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[275] Los Angeles; Albany and New York; Detroit; Columbus and Cincinnati; Western Pennsylvania and Philadelphia; Chicago.

[276] *Columbus Area* (1953) 1739.

[277] *Philadelphia Area* (1952) 4381; 2 *Western Pennsylvania* (1950) 2365; 3 *Western Pennsylvania* (1950) 3007, 3029; In the former, Mr. Walter was part of a subcommittee of two, in the latter he was alone.

[278] 1 *Albany Area* (1953) 2361, 2417; 2 *Albany Area* (1953) 2473, 2537.

[279] 4 *Investigation (Exec.)* 1839.

[280] 6 *Motion Picture Industry* (1951) 2061.

Jackson also presided at the Los Angeles hearings over a subcommittee of himself and Representative Clyde Doyle of California.[281] Some of the investigation into professional groups in Los Angeles was conducted by Doyle, who presided over a subcommittee consisting of Mr. Jackson and himself.[282]

Earlier committees also engaged in this practice. Hearings into conditions at Japanese detention camps were conducted with Representative Costello of California presiding.[283] A subcommittee of one to investigate communism in Alabama and Tennessee consisted of Representative Starnes of Alabama.[284]

Another way in which the committee uses its powers for political purposes is through the issuance of its own propaganda. This program is designed to ensure that communism and its satellite group of political offenses will be defined in horrendous enough terms so that the exposure of the individual will bring into play sufficiently harsh private sanctions. In addition to its own reports and press releases, the committee has issued in enormous quantities publications dealing with communism.[285] These publica-

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[281] 3 *Los Angeles Area* (1953) 685.

[282] 4 *Los Angeles Professional Groups* (1952) 4169.

[283] 15 *Investigation* 8833.

[284] 3 *Investigation* (*Exec.*) 983.

[285] See, for example,
100 Things You Should Know About Communism in the U. S. A.
100 Things You Should Know About Communism and Religion
100 Things You Should Know About Communism and Education
100 Things You Should Know About Communism and Labor
100 Things You Should Know About Communism and Government
Spotlight on Spies
Review of the Scientific and Cultural Conference for World Peace
Report on the Congress of American Women
Report on the American Slav Congress and Associated Organizations
The Communist "Peace Petition" Campaign (Interim Statement)
Report on the National Lawyers Guild

(Footnote Continued on Page 130)

tions are not reports to Congress at all, but are rather another manifestation of the emergence of the committee as an independent and autonomous entity functioning outside of the American political system as it has been traditionally defined.[286]

(Footnote Continued from Page 129)

Report on the Honolulu Record
Report on the National Committee to Defeat the Mundt Bill
Statement on The March of Treason
Report on the Communist "Peace" Offensive
The Shameful Years, Thirty Years of Soviet Espionage in the United States
Review of the Methodist Federation for Social Action

[286] The committee's activities as a propaganda agency led Congressman Arthur D. Klein to make the following protest in 1948:

October 11, 1948

HONORABLE KARL M. LECOMPTE
Chairman
Committee on House Administration
House of Representatives

DEAR MR. CHAIRMAN:

It has come to my attention that the Committee on Un-American Activities is publishing propaganda without authority of the House of Representatives, paying for it out of funds appropriated for the purposes of Rule 21(q), and that not only has payment for one such publication been approved by your committee but the Committee on Un-American Activities now has ready for printing a new propaganda booklet with a planned press run of 100,000 copies, which it also plans to pay for from funds not authorized for such purposes.

I wish to enter my emphatic protest against allowing the committee to go so far outside the mandate of its rule and its arrogation to itself of powers reserved to the whole House.

It is not my purpose to enter into any extended discussion of the merits of the pamphlets, for the obvious impropriety of the action is of sufficient gravity to stand alone.

However, I cannot avoid pointing out that the Committee on Un-American Activities has been functioning for many months, even years, as a valued tool of the Republican National Committee, and that the pamphlet already issued, while probably reasonable enough of and by itself, has been widely disseminated as Republican campaign literature, apparently at the taxpayers' expense.

The rule under which the Committee on Un-American Activities was created as a standing committee is clear and unequivocal.

(Footnote Continued on Page 131)

E. The resolution as consistently applied by the committee violates constitutional principles.

As we have demonstrated, the key to the committee's functioning and the characteristic way in which it interprets its resolution is the exposure system. Individuals who are identified with the condemned ideas and organizations, either directly or by association, are under compulsory

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(Footnote Continued from Page 130)

While I know that you yourself are fully cognizant of the language of the rule, it is quite obvious that neither the Members nor the staff employees of the Committee on Un-American Activities are familiar with the wording of Rule 71(q) of the Rules of the House of Representatives as adopted in the Congressional Reorganization Act of 1946—or, if they are, they do not appear to feel bound by it.

Therefore I am incorporating the text of the rule as it defines the mandate from the House Manual of the 80th Congress.

"Rule XI (q) (1) Committee on Un-American Activities. (A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable."

Clearly there is no authorization in the rule, nor in the appropriating resolutions, to authorize the preparation or printing or dissemination of Republican party propaganda by the Committee on Un-American Activities, nor for your committee to approve the expenditure of committee funds for such purposes.

"100 Questions About Communism," while typographically excellent, cannot by any flight of fancy be construed as an investigative or legislative report or recommendation within the meaning of the rule; and if it were a report the legal limitation of printing in the

(Footnote Continued on Page 132)

process summoned by the score before the committee and interrogated under oath and threat of contempt sanctions concerning their own beliefs, affiliations and associations

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(Footnote Continued from Page 131)

absence of adoption of a print resolution by the House is 1,000 copies.

By the same token, the planned "100 Questions About Communism and Religion" cannot be justified as a committee report, nor could the printing of 100,000 copies without prior authorization of the House be justified under any rule or statute.

I am particularly disturbed by the irregularity and impropriety of the actions taken by the Committee on Un-American Activities because this committee, laboring in a delicate field of human freedoms and national security, should be like Caesar's wife—above suspicion.

When the Committee on Un-American Activities sets up in business as a propaganda and publishing agency without authorization from the House of Representatives—indeed, without even public knowledge and discussion—it lays itself and the House open to justified criticism, and subverts the orderly procedure of legislative business.

Most emphatically, I urge you and your committee to refuse to authorize payment to the Government Printing Office of any vouchers for the printing of any propaganda pamphlets from the committee, or any copies of reports or recommendations beyond the statutory provision, until and unless the House has previously approved the expenditure by formal resolution.

I further urge you to instruct the Public Printer that he will accept composition or print orders not clearly authorized by the rule at his own risk. I make this latter suggestion because I have been given to understand that a great deal of expensive composition already has been completed for projected publications of the Committee on Un-American Activities.

I should be grateful to you also for a statement of the total amount of funds already spent by the Committee on Un-American Activities for unauthorized printing of propaganda publications since the adoption of Rule 21(q). I think the American people deserve to have the information.

Please be assured of my deep respect for the correctness of your own position in this difficult matter, and of my confidence that you will act promptly and effectively to protect the dignity and probity of the House.

Cordially yours,

ARTHUR G. KLEIN
Member of Congress

past and present, as well as those of others. Putting to one side the issue to be discussed subsequently of whether the First Amendment permits such *ad hoc* questions, the point we make here is that this system is designed for a purpose quite foreign to legislation, to bring to bear upon the individual holding views disapproved of by the committee, the full weight of the government's disapproval.

As we have said, the government has no power under the First Amendment to classify or censor ideas and it has less power to exert its authority against individuals for the sole purpose of exposing their link to ideas and organizations whose expression and functioning constitute the exercise of First Amendment rights. The interference with the democratic process could hardly be more crude. While the discouraging and intimidating consequences to free expression are great when the government uses its powers of inquiry for the purpose of separating orthodox from unorthodox ideas and affiliations, those consequences may ultimately lose their effect. More hardy individuals may not be deterred by the fact that they espouse ideas or belong to organizations which are condemned by the committee. But the committee knows this, too. In order to make certain that the effectiveness of the censorship system will not depend solely upon the persuasiveness of its judgments, it uses its power to expose, attack and harass the individual. Thus in America today free expression is subject to an enormous hazard. The elimination of dissent, as this Court has predicted it would (see *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624) has led to the elimination of dissenters.

The right to form and participate in associations is an expression of and is protected by the free assembly and speech guarantees of the First Amendment. The process of group formation in the public interest is the fulfillment of democracy. It is the means through which the rights of speech, press, petition and assembly are made effective. From the beginning, the vigorous activity of private or-

ganizations and associations has been a hallmark of the democratic process.[287]

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[287] The unique contribution of voluntary associations to the formation and strengthening of democratic processes and institutions in the United States has been the subject of frequent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (New York, 1933), 409-410; Bryce, *The American Commonwealth* (New York, 1910), 294; de Tocqueville, *Democracy in America* (New York, 1900), 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (Boston, 1922), 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see

Race Relations:

Hobbs, *The Antislavery Impulse* (New York, 1933); McMaster, II *History of the People of the United States* (New York, 1895), 21; Myrdal, II *An American Dilemma* (New York, 1944), 810-857;

Peace Movements:

Curti, *American Peace Crusade* (Durham, N. C., 1929); Schlesinger, *The Rise of the City* (New York, 1933), 365-366;

Economic Relations:

Hinds, *American Communities and Cooperative Colonies* (Chicago, 1908; Noyes, *History of American Socialisms* (Philadelphia, 1870); Adams, ed., VI *History of Cooperation in the United States*, Johns Hopkins Studies in Historical and Political Science (Baltimore, 1888);

Women's Rights:

Schlesinger, *New Viewpoints in American History* (New York, 1926), 126-160;

Public Schools and Adult Education:

Curti, *The Growth of American Thought* (New York, 1943), 349-352, 596-597; Post, *Popular Free Thought in America* (New York, 1943), 87;

Land Reform and Colonization:

Zahler, *Eastern Workingmen and National Land Policy* (New York, 1941); McMaster, *op. cit.*, VI, 109;

Agricultural Associations:

Oberholtzer, III *A History of the United States Since the Civil War* (New York, 1926), 102-109; Hicks, *The Populist Revolt* (Minneapolis, 1931);

Humanitarian and Related Movements:

Fish, *Rise of the Common Man* (New York, 1927), 259-260; Stewart, *The National Civil Service Reform League* (Austin, Tex., 1929); Nevins, *The Emergence of Modern America* (New York, 1927), 334; McCrea, *The Humane Movement* (New York, 1910).

Obviously, the right to engage in political activity enjoys constitutional protection. Indeed, as we have shown, this right lies at the heart of the First Amendment. The right to assemble and to associate around an idea or program is secured not simply to protect the liberty of the individual but to make it possible for him to share in basic political processes.

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guarantee with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, cf. *DeJonge* v. *Oregon*, 299 U. S. 353, 364, and therefore are united in the First Article's assurance. Cf. 1 Annals of Congress 759-760.
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> "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience [citing cases]. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins*, 323 U. S. 516, 530-531.
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> "One of the chief reasons for freedom of the press is to insure freedom on the part of individuals at least, of political discussion of men and measures, in order that the electorate at the polls may express the genuine and informed will of the people. Brandeis, J., in *Whitney* v. *California*, 274 U. S. 357, 375. Hughes, C. J., in *Stromberg* v. *California*, 283 U. S. 358, 369. Individuals seldom press their views upon the electorate without organization. They have a right to organize into parties, and even into what are called 'pressure groups,' for the purpose of advancing causes in which they believe." *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 252.
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> "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of

> acting in common with them. The right of association therefore appears to be almost as inalienable in its nature as is the right of personal liberty. No legislator can attack it without impairing the foundations of society." de *Tocqueville, I Democracy in America* 196.

Political association and affiliation is the form which the right to assembly characteristically takes in America. The formation of political parties has been not only the accepted but the necessary form of political action and expression. See, for example, Beard, *The Republic* (New York, 1943), 267-273; McLaughlin, "The Significance of Political Parties," in 101 *Atlantic Monthly* 145-146 (February 1908); Merriam, *American Political Ideas—Studies in the Development of American Political Thought*, 1865-1917 (New York, 1920), 291-292; Spitz, *Patterns of Anti-Democratic Thought* (New York, 1949), 110.

The right of political association and affiliation is thus an exercise of a fundamental right shaped by the realities of our time and fully protected by the First Amendment. If an activity is protected by the First Amendment, then its exposure, as the committee practices it, is unconstitutional. Certainly no one would dispute the fact that Congress could not pass a law authorizing the kinds of compulsory disclosures systematically demanded by the committee over the past fifteen years. But, as we have shown, the power of inquiry is also limited by the First Amendment. More than this, the power of inquiry is subject to certain unique and inherent limitations which prevent its use for the exposure of political expression or affiliation. We insist that in passing upon the precious rights of speech and assembly which are involved in this case, the Court must recognize five relevant limitations upon the power of inquiry, in addition to the First Amendment. These are (1) the scope of the power is limited by the legislative function; (2) congressional inquiry is unauthorized into personal and private affairs; (3) in any event, inquiry into the private affairs of private citizens may be con-

ducted only to the extent that some pressing legislative purpose makes it necessary; (4) the looseness of legislative procedures and the temptation to conduct inquiries for partisan political ends require sharp limitations of the investigative power, and (5) the authorization for exercising the power must be precisely phrased so that the witness may not be wrongfully compelled to make disclosures not pertinent to the inquiry.

1. This Court long ago said of the investigatory power (*Kilbourn* v. *Thompson*, 103 U. S. 168, 181) that, "It will scarcely be contended by the most ardent advocate of this power in that respect that it is unlimited." The exercise of the power must be confined to matters within the constitutional authority of Congress.[288] It is an implied power. Like other implied powers, it "is a means to an end and not the end itself" and "rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred." *Marshall* v. *Gordon*, 243 U. S. 521, 541.

In 1927, in *McGrain* v. *Daugherty*, 273 U. S. 135, 173-174, the Court reiterated that the power to investigate is not a "general" one but must be exercised for a legislative purpose:

> "* * * the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and * * * neither House is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied."

[288] *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 614; *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388.

But the whole exposure system through which the committee functions is not in aid of the legislative process. It is indeed a rival to and a substitute for it. The committee chairman at the very beginning of its existence conceded that since the committee's legislative products might jeopardize fundamental rights, the committee would pursue the course of exposure (*supra*, note 53). And the record of the committee confirms its essentially non-legislative functions (*supra*, pp. 56-131). Thus there is no constitutional foundation for the fifteen-year non-stop exposure operation which the committee has been conducting.

Certainly, the use of the investigative power as a non-legislative instrument of mass persecution of thousands of individuals in private life finds no support in the so-called "informing function of Congress," [289] even if authorization for such function could be found in the Constitution. Indeed, the most that has been claimed for this function is that it authorizes inquiry into the affairs of government and into "the acts and the disposition of the administrative agents of the government" in order to acquaint the country with "how it is being served." [290]

2. In 1929, in *Sinclair* v. *United States*, 279 U. S. 263, 292, the Court repeated the central thesis of the *Kilbourn* case, *supra*, that the individual has "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs." In the *Sinclair* case, this Court cited with approval all of its historic rulings protecting personal and private rights. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 478; *Harriman* v. *Interstate Commerce*

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[289] See Wilson, *Congressional Government*, 303; cited in *United States* v. *Rumely*, 345 U. S. 41, 43.

[290] *Ibid.* See also Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 University of Pennsylvania L. R. 813-814.

Commission, 211 U. S. 407;[291] *United States* v. *Louisville & Nashville R. Co.*, 236 U. S. 318, 335; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305, 306.

The interest which is characteristically invaded by the committee, political expression, has a strong claim to the protection of privacy and personal security, see *infra*, pp. 153-160. If privacy places a curb upon the scope of conventional types of disclosures, it surely limits the operation of an exposure system which has as its avowed purpose the enforced disclosure of the individual's political beliefs and associations. Moreover, this is not a case where the disclosure of private matters is forced in the chambers of an administrative agency for its use in regulation. The disclosures of private and personal matters which are demanded by the committee of private citizens are dramatized to achieve the maximum of publicity. It is the purpose and plan of the committee through television broadcasts, press releases and well-timed announcements to expose the individual to the "light of pitiless publicity." *Supra*, note 53. The invasion of privacy is not an unfortunate by-product of the inquiry necessitated by some other purpose, but rather its primary purpose.

3. The power to formulate legislation is the only congressional power which can be said to require some inquiry into the private affairs of private citizens.[292] But the

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[291] It was concerning this case that Mr. Justice Holmes wrote to Harold J. Laski:

> "The claims of the Interstate Commerce Commission in I. C. C. v. Harriman, 211 U. S. 407, made my blood * * * boil and it made my heart sick to think that they excited no general revolt. The soft period of culture that I spoke of the other day tended to oblivion of the fighting significance of guarantees." *Holmes-Laski Letters, The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, 21.

[292] The congressional functions which may be aided by investigation in addition to that of formulating legislation pursuant to Article I, Sec. 8 are the control by Congress of its members (Art. I, Sec. 15,

(Footnote Continued on Page 140)

solicitude of our law for the right of personal security and the protection from public scrutiny of the private affairs of private citizens prevents congressional investigation into those affairs as an end in itself. Inquiries of this kind can only be justified when they are directly related to legislation. Congress cannot assemble information from trade unionists, preachers, teachers, actors, writers, and scores of other classes of individuals in private employment upon the representation that such information might possibly be useful for later legislation. The importance of the right to be let alone by the government makes necessary the establishment of a convincing legislative justification, within the limitations of the First Amendment, for an inquiry into personal matters.

4. Although the committee invades some of the most important rights which a citizen enjoys—speech, press, assembly and privacy, its procedures are flagrantly unjust. The individual of whose views it disapproves receives no notice of the charges against him, no real opportunity to answer them, no effective right of cross-examination or meaningful right to counsel. The standards which govern the committee's judgment of him reflect the bias and hostility of the committee members and are designed to enable the committee to establish his guilt and to prevent him from proving his innocence. The fact that the committee is a political body leads it to multiply its excesses. Its entire functioning is frequently little more than a poorly concealed form of political campaigning, see *supra*, pp. 124-127. And such partisan political objectives as subpoenaing the former President of the United States to provide a "more juicy hearing" to "get into the act," and to "beat the

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(Footnote Continued from Page 139)

Clauses 1, 2); impeachment (Art. I, Sec. 3, Clause 6); and the power to make appropriations required for the administration of the laws (Art. I, Sec. 7, Clause 1). But all of these functions may be performed without investigation into the private affairs of private citizens.

Senate to the punch" (*supra*, p. 125), inevitably drive the committee into the exercise of irresponsible and arbitrary power. All of these evils which flow from the congressional investigative process require that the power of inquiry be supervised and limited. As Wigmore has put it:

> "Not only does the logic of the legislative needs call for a strict limitation of this power, but also the policy of the situation; for the Legislatures are not bound by, and do not employ, the evidential rules that in judicial trials protect parties and witnesses and check abuses of power * * *. Moreover, legislative inquiries are sometimes conducted for partisan purposes and personal aggrandizement, and there is a particular temptation to pursue the inquiry beyond the necessities of contemplated legislation and to assume improperly the function of a grand jury." [293]

5. We have already pointed out that the vague and broad character of the terms of the resolution authorizes a far-flung system of censorship limited only by the personal interest and prejudices of the committee members and that the very scope of the resolution interferes with freedom of expression. The contentions which have been made under this head in Point I of this brief are fortified by the detailed account of the extent and scope of the committee's hearings which has been presented in this point. But it is not merely the resolution's broad investigative threat which inhibits free expression.

The intimidating impact of the resolution is reinforced by Section 192 which compels disclosure through contempt sanctions. The crime for which Section 192 imposes penalties is the crime of refusing to "answer any question pertinent to the question under inquiry." In order to determine whether a punishable crime has been committed, it therefore becomes necessary to refer to the legislative act or resolution defining the matter under inquiry. As

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[293] 8 Wigmore, *Evidence* (3d ed.), § 2195, 80.

the Court has pointed out in *McGrain* v. *Daugherty*, 273 U. S. 135, 176, the crime is committed only when the question which the witness refuses to answer is "pertinent to the matter under inquiry." See, also, *Sinclair* v. *United States*, *supra*, and *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 25-26. It is thus clear that the standard of guilt under Section 192 is the language of the resolution.

Because compulsory disclosure of political expression is an abridgement of the First Amendment, the resolution must precisely define the area of its operations, for the reasons which have already been stated. *Supra*, p. 50. Historic abuses in the use of the contempt power emphasize the need for definiteness in this area. Long ago, Thomas Jefferson observed as to the congressional contempt powers, "* * * if the offense is to be undefined, and to be declared only *ex re nata*, according to the passions of the moment, the condition of the citizen will be perilous indeed." *Jefferson's Manual* (Sen. ed., 1892) 194.

It was certainly an important purpose of Section 192 to cure the indefiniteness of the offense, to withdraw from Congress the power to be its own judge of the propriety of invoking the contempt sanction and to create a standard for the guidance of the courts in adjudicating congressional contempts.[294]

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[294] Thus, in the course of the debate in the Senate on Section 192, Senator Seward, objecting to the scope of the bill, stated:

> "* * * it may be a subject over which Congress has no jurisdiction. It may be foreign from all the provisions of the Constitution; it may be a local question; it may be a State question; it may be a personal question; it is not necessarily a public question."

Senator Bayard replied:

> "It is a rule of law very well settled, that if there is no jurisdiction over the subject matter, the proceeding is void. In such a case, of course, a court of justice would decide that the witness could not be compelled to answer for want of jurisdiction."

(Footnote Continued on Page 143)

When the witness comes to Washington and is interrogated concerning his political activities and affiliations, the resolution gives him no guide as to the point at which he may validly refuse to answer on the ground that the question is not pertinent to the inquiry. Mercilessly harassed by the committee in a public spectacle staged to destroy him, the witness can find no ground on which to stand in defense of his constitutional rights. While under the mental and emotional strain which almost every private citizen experiences who has been subpoenaed by the committee, he is asked questions about his associations and affiliations. The vagueness of the resolution forces him, whether or not advised by counsel, to hazard blindly between the First Amendment and a jail sentence.

Since this systematic ideological grilling is a regular feature of our national life and is reported in the news-

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(Footnote Continued from Page 142)

Senator Seward had suggested insertion of the word "material" before "question," and Senator Bayard asserted:

> "In my judgment the word 'material' is utterly unnecessary because 'pertinent' includes it."

As to Senator Seward's objection to broad jurisdiction, Senator Bayard said:

> "I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coördinate branches of the Government, but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting in the breast of either House) from Congress to the courts of justice. When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject-matter?—has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void, and the party cannot be held liable under indictment. The court would quash the indictment if this fact appeared on its face; and if it appeared on the trial they would direct the jury to acquit." 26 Cong. Globe, 34 Cong., 3d Sess. (1857) 439-440.

papers with the same regularity as the weather forecast or the comics, its lessons are brought home to everyone. The fear and the tension which it generates are universal. Its effect upon freedom is poisonous.

Thus the resolution imposes no meaningful restraints on the committee's power to compel answers; it gives no guide to the witness in determining what questions he may legitimately refuse to answer; and it offers no standard to the court in a Section 102 proceeding in determining pertinency. Under such circumstances, irresponsibility and bias are bound to guide the committee; fear and uncertainty the witness; and timidity and confusion the court.[295]

POINT III

The resolution was unconstitutionally applied to petitioner.

In this portion of the brief we contend that even if the resolution could have constitutional application to require disclosure in some areas, petitioner, could not be constitutionally compelled to answer the questions which he declined to answer. Since most of the contentions made here are involved directly or indirectly in *United States* v. *Rumely*, 345 U. S. 41 we first turn to an analysis of that case.

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[295] In any event, judicial doubts, often very searching, concerning the abuses of the investigative power seem never to find expression in cases of this kind. In other kinds of cases, such doubts are reflected in instructions which permit juries to determine whether the defendant's challenge to the scope of the resolution establishes his good faith, and hence exculpate him (see Rashid, *The Problem of Wilful Default Before a Congressional Investigating Committee*, 35 Georgetown L. J. 527-537), or the courts themselves will as a matter of law find the question not pertinent to the matter under inquiry (see *Bowers* v. *United States*, 202 F. 2d 447 (C. A. D. C.)) or beyond the scope of the resolution (*Rumely* v. *United States*, 197 F. 2d 166 (C. A. D. C.), affirmed 345 U. S. 41).

A. The Court's decision in *United States* v. *Rumely*.

Rumely was convicted on three counts of an indictment for violation of Section 192 because of a charged failure to produce the records of the Committee for Constitutional Government, an organization of which he is executive secretary, showing the names and addresses of individuals from whom financial contributions of certain amounts had been received for any purpose during certain specified periods, as well as the failure to answer a question put to him by a congressional committee, namely, the identity of an individual who contributed $2,000 for the distribution of a book circulated by his organization. The resolution (H. Res. 298, 81st Cong., 1st Sess.), authorized the Select Committee on Lobbying Activities "to conduct a study and investigation of (1) all lobbying activities intended to influence, encourage, promote, or retard legislation * * *."

Rumely repeatedly refused to supply the select committee with the names of those who had bought the books published by his organization or ordered their distribution. His fundamental position was thus expressed to the committee (197 F. 2d 166, 170 (C. A. D. C.)):

> "I certainly refuse to disclose those names—not contemptuously, but respectfully, because I feel it is my duty to uphold the fundamental principles of the Bill of Rights. I think that there is no power to require of a publisher the names of the people who buy his products, and that you are exceeding your right."

The report of the select committee to the House revealed that the committee's distribution of printed material was for the purpose of influencing "legislation indirectly by influencing public opinion" and that such activity "constitutes an attempt by that organization to influence legislation, directly or indirectly." In addition, the committee in its report indicated that a separate and independent basis for the assertion of its jurisdiction could be found in the fact "that refusal to submit pertinent financial records

might cover subterfuges to evade the Federal Regulation of Lobbying Act, i.e., to mask contributions as purchases." *Ibid.*, 171.

The Court of Appeals found that Congress lacks the power to investigate efforts to influence public opinion and that the disclosure which Rumely had resisted constituted an infringement on free speech. It rejected the government's contentions that modern media of mass communications had made indirect lobbying techniques a far greater danger to the legislative process than personal solicitation of legislators and that for that reason it was most appropriate to apply to this entire field the disclosure therapy resorted to in the Federal Lobbying Act and the Federal Corrupt Practices Act. The court dismissed these contentions by pointing to the fact that the modern techniques referred to nevertheless involve the exercise of First Amendment freedoms and that mechanical progress could not destroy the validity of those freedoms; that Rumely's registration under the Federal Lobbying Act did not give pertinency to the inquiry, for such pertinency is established not by the activities of the witness but by the subject matter under inquiry.

This Court affirmed the judgment of the Court of Appeals and on substantially the same theory. The Court ruled that to construe the resolution of the House of Representatives as contended for by the government would create a serious constitutional question. It held that the "controlling charter of the committee's powers" contained no definition of the term "lobbying activities." 345 U. S. at 44-45. The Court therefore ruled that its duty to avoid a constitutional issue—equally applicable to legislation as to congressional resolutions—required it to construe the resolution in the restricted sense urged by Rumely, 345 U. S. at 47-48. See also to the same effect *United States* v. *Orman*, 207 F. 2d 148, 158 (C. A. 3).

We submit that the following conclusions of critical significance to the disposition of the present case may validly be drawn from the *Rumely* case.

(1) Congressional investigative resolutions are tested by the First Amendment in the same way that a statute is tested by the First Amendment and that if there is an "informing function" of Congress it also is limited by the First Amendment. 345 U. S. at 43, 45.

(2) The investigation of "indirect lobbying" and the disclosure of the names of individual financial supporters of Rumely's organization raise serious questions under the First Amendment. *Ibid.* This is so despite the fact that such disclosure imposes no legal sanction, but inhibits speech only because it creates social or economic pressures; despite the fact that disclosure legislation could possibly advance the public interest by revealing the sponsorship of ideas and despite the fact that the technique of compulsory disclosure has been increasingly resorted to police electoral and legislative process as well as other areas.

(3) Although Rumely was registered under the Federal Regulation of Lobbying Act which seeks by disclosure to deal with direct or indirect influences on the passage or defeat of legislation, the Court refused to expand the scope of the resolution to authorize the inquiry complained of. 345 U. S. at 45.

(4) Neither a favorable legislative history showing a broad purpose to probe organized influences on public opinion, a history of prior investigations into lobbying nor the select committee's own construction of its authority was deemed by the Court adequate to justify expanding the scope of the resolution. See 197 F. 2d at 178-186.

(5) The resolution construed by the Court authorized an investigation of "all lobbying activities." 345 U. S. at 44. The Court did not find that the term "activities" expands the scope of the word "lobbying" so as to include attempts to influence the passage or defeat of legislation indirectly.

The principles of the *Rumely* case are fully applicable here. Certainly, if a First Amendment question is raised by the compulsory disclosure of the name of a financial contributor to an activity involving the exercise of First Amendment rights, it is raised far more sharply by the requirement here that the petitioner reveal his political affiliations, as well as those of others. In the same way, if the resolution involved in the *Rumely* case, authorizing an investigation of "all lobbying activities," could not be construed to authorize an inquiry into attempts to influence public opinion in an organized way and in support of a particular viewpoint on matters subject to federal legislation, surely the term "propaganda activities" cannot be construed to authorize an investigation of the security measures employed by government agencies with respect to national officers of labor unions[296] or an inquisition into political affiliation.

Finally, the Court found it constitutionally necessary to restrict the language of the resolution in *Rumely* to exclude inquiry into indirect lobbying, despite the fact that the congressional power in this area has two independent sources, one legislative and the other the inherent power of Congress to investigate the conduct of its members, *In re Chapman*, 166 U. S. 661, and in the face of the further fact that disclosure is a familiar and well-recognized therapy in these areas. In this case, no such well-rooted power justifies the inquiry, for here the inquisitorial purpose aids neither the legislative nor the inherent powers of Congress; and far from being sanctioned by practice or usage, compulsory disclosure of political beliefs and affiliations is flatly in conflict with the First Amendment.

B. The specific inquiry involved here.

Apart from press releases and newspaper reports published prior to the hearings (*supra*, p. 9), petitioner had

[296] This justification for the inquiry was advanced at the trial (R. 157) and is discussed below.

no notice either prior to or at the time of the hearing concerning the nature and purpose of the particular inquiry for which his testimony was sought. At the hearing the sole justification advanced in support of the inquiry was "exposure" (*supra*, p. 7).

At the trial, the counsel for the committee testified that the "specific purpose" of calling petitioner was to develop "the practices and duties of various officials of the national organization of UE with the idea of determining whether or not there was a difference in practice, in certain government agencies, in screening or clearing officials of the Union for security purposes in plants where the Atomic Energy Commission, or the Army, Navy, and Air Force, were having secret government projects worked upon" (R. 157).

The hearing "was set up for [this] particular purpose" (R. 157). In addition to this "specific" and "particular" purpose, the hearing was claimed to constitute "part of an investigation which the committee had undertaken some months prior[297] * * * into the infiltration of Communist labor unions working on defense projects, from the standpoint of individuals who weren't actually working in the plant but who were officials of the union, as distinguished from those who had actual contact with classified material" (R. 157). The hearing "followed the reference" (R. 157) to the committee of the Wood Bill.[298]

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[297] This is an apparent reference to the hearings which gave rise to *Quinn* v. *United States*, *supra*. The issue of pertinency is developed at pp. 115-117 of the record in that case.

[298] H. Res. 3903, 81st Cong., 1st Sess. It provides in pertinent part:

Sec. 2. It shall be unlawful for any individual employed in connection with the performance of any national defense contract—

(1) to become or remain a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General;

(Footnote Continued on Page 150)

C. The First Amendment prevents compulsory disclosure of political affiliations.

As we have already shown, the right to engage in political activity is dependent upon the fundamental First Amendment rights of free speech, press and assembly. Certainly, it can no longer be denied, in view of this Court's decision in the *Rumely* case, that to force public disclosure of the exercise of these rights is to violate the Constitution. This Court has long recognized that the First Amendment would be made a nullity if it were applicable only to direct prohibitions or infringements.

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control." Jackson, J., concurring in *Thomas* v. *Collins*, *supra*, at 547.

In *Thomas* v. *Collins*, *supra*, a Texas statute required all labor organizers to register before soliciting members—giving name, union affiliations and credentials. Upon such registration the Secretary of State was required to issue an organizer's card. The Court held that, as applied to one who had made a speech to an assemblage of workers during which he invited his hearers generally to join a union, the

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(Footnote Continued from Page 149)

(2) to contribute funds or services to the Communist Party of the United States of America or to any organization which shall have been designated as subversive by the Attorney General; or

(3) to advise, counsel, or urge any other individual employed in connection with the performance of any national defense contract to perform, or to omit to perform, any act if such act or omission would constitute a violation of clause (1) or (2) of this section.

Sec. 3. Whoever violates any provision of this Act shall be fined not more than $3,000, or imprisoned for not more than three years, or both.

statute was unconstitutional because its practical effect was to restrict the right to speak in favor of unionism. The state sought to defend the statute on the ground, among others, that the statute "is merely a previous identification requirement" (p. 538) since the Secretary of State could not refuse a card but had to issue it upon registration. The Court held, however, that such an identification requirement was a restriction upon freedom of speech and therefore unconstitutional.

In *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, this Court struck down the "released time" religious training program theretofore in effect in Illinois grade and junior high schools. One of the features of the state program, recognized by that decision to be destructive of free choice in the area of religion, was compelled public disclosure of minority opinion which exposed the children adhering thereto to social pressure by majority groups. In that case the school children were required once each week to separate themselves into groups to attend different classrooms, there to receive religious training from volunteer teachers appearing for various religious creeds. There was no state compulsion favoring attendance at any particular class and there was no affirmative discrimination against any creed, all being free to participate equally. However, those pupils not choosing to attend one or another of the religious classes afforded by participating creeds were required to assemble in yet another classroom to continue secular study. Thus, by process of compelled choice and elimination, the children of non-participating creeds together with children accepting no creed at all were made known to their fellows and were thereby exposed to social pressure and coercion tending to influence them to adopt conforming majority ideas. The Court observed that the state program rendered the religious creeds participating in the program "an invaluable aid in that it helps to provide pupils for their religious classes * * *." See 333 U. S. at 212. The program was held unconstitutional

as a violation of the neutrality required of the state in the area of religious thought.[299]

And this Court pointed out in *American Communications Association* v. *Douds, supra,* at 402:

> "* * * the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

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[299] In his concurring opinion (at 227-228), Mr. Justice Frankfurter made this point particularly plain. He observed that the constitutional protection of religious freedom prohibits coercion, however subtly exercised, and that the Illinois program contained "powerful elements of inherent pressure," not removed by the treatment of all sects equally by the school authorities.

> "* * * That a child is offered an alternative may reduce his constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages."

See, also, *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Jones* v. *Opelika*, 319 U. S. 103, adopting dissents in 316 U. S. 584, 600, 611, 623; *Meyer* v. *Nebraska*, 262 U. S. 390.

It can never be too often repeated that under the American constitutional system each constitutional right functions through forms appropriate to its nature and history. See *Gompers* v. *U. S.*, 233 U. S. 604, 610. "Liberty, in each of its phases, has its history and connotation * * *." Whether a particular form of state action violates "the essential attributes of that liberty" must be judged in the light of the nature of the liberty that is involved. *Near* v. *Minnesota*, 283 U. S. 697, 708; *Prince* v. *Massachusetts*, 321 U. S. 158, 164.

It is deeply rooted in the American constitutional system that groups which function through the exercise of civil rights must enjoy these rights free of compulsory disclosure. It would be a mockery to suggest that the sponsors of the First Amendment, fresh from a struggle against tyranny, intended to expose minority groups to the oppression which the state visits upon the dissenter. From the very beginning, the need for privacy in connection with political activity was recognized. Thus, Channing, in *IV A History of the United States* (New York, 1926), 224-225, states with respect to the political activities of Jefferson:

> "The secrecy with which Jefferson concealed his political motions makes it very difficult to say exactly what he did or did not do in any particular case. He was in the habit of gathering his political friends about him for confidential weekends at Monticello, selecting times when court was held at the neighboring county seat so that Madison, Monroe, and Wilson Cary Nicholas might have some ostensible reason for being in his neighborhood, other than visiting him. On one occasion he made Mrs. Madison the bearer of an invitation to her husband to come and confer with him and

> Nicholas and informed Madison that his wife did not know the object of the meeting. (Letter dated Monticello, Aug. 26, 1799.) Later he enclosed a draft of some paper to a correspondent reminding him that he had promised to copy it himself and not to let it be seen by anyone in the original, nor to permit the least idea to escape as to the 'quarter from which it comes.' At this time he was doubly cautious. He drew up a series of resolutions condemnatory of the Alien and Sedition laws and gave them to Nicholas in the expectation that they would be put forth by the North Carolina Assembly. In October, 1798, John Breckinridge was in Virginia and visited Nicholas. The latter gave him a copy of Jefferson's Resolutions and informed Jefferson that Breckinridge was confident 'the legislature of Kentucky (of which he was a member) will adopt them.' Nicholas added that Breckinridge was very anxious to pay his respects to Jefferson, but 'we both thought it best that he should not see you, as we believed if he did the resolutions would be attributed to you. I ventured to inform him that they came from you.'" (W. C. Nicholas to Jefferson, October 4, 1798.)

Similarly, it is stated in another work, Wilfred E. Binkley, *American Political Parties—Their Natural History* (New York, 1943), 67-68:

> "Our present party organization is the lineal discendant of the Revolutionary committees of correspondence * * * Late in Washington's first term * * * the superb Virginia politician (Thomas Jefferson) was busy with the courthouse cliques, organizing them on the familiar pattern of the revolutionists of the 1770's. With characteristic secrecy the sage of Monticello gathered Virginia leaders at his home whenever court brought them to the neighborhood and his purpose would therefore not be suspected."

See also VII *The Writings of Thomas Jefferson*, Ford. ed. (New York, London, 1896), 344.

Eugene P. Link in his authoritative study, *Democratic-Republican Societies, 1790-1800*, (New York, 1942) com-

menting on the Federalist charge that the popular clubs of the 1790's were secret, states: (115-116 note 63):

> "63. The societies' requirements for membership differed a little from place to place. The standard procedure was to have the support of two or three persons who were already members, to pay a small amount for dues, twenty-five or fifty cents, and to sign the principles as set forth in the constitution. Because of the opposition, some societies were forced to make their membership status more rigid. In Newark the Federalists came to the final meeting of the Republican Society in such numbers as to put through a vote to the effect that such a society was unnecessary and should not organize; (Wood's Newark Gazette, March 12, 1794). In New York the self-styled 'Friends of Good Order' set about to frustrate a meeting of democrats; see the Federalists' admission of such an attempt in Webb, Correspondence and Journals of Samuel B. Webb, pp. 197-98. It is hardly accurate to call the societies secret because they found it necessary to exclude enemies who sought to 'bore from within.' The Portland Republican Society, in the rough draft of its 'Republican Articles,' asks that no member reveal transactions that go on within the society. The final draft, however, which the members signed, did not contain this article (Portland Republican Society Papers). Washington's Neutrality Proclamation of 1793 made those societies which were concerned with Genet's projects in the Southwest more secretive about actions related to those plans. When by fiat the President outlawed their plans, they, too, were forced to carry on certain phases of their program secretly." [300]

It seems obvious that the Constitution would be converted into meaningless scrap of paper if its protections were denied to those groups who are forced to exercise their rights in private. Indeed, the government itself has recognized the vital importance of anonymity in the protection of the rights of labor, in a brief filed in this Supreme Court

[300] To the same effect, see, F. Byrdsall, "The History of the Locofoco or Equal Rights Party" (New York, 1842), p. 18.

by the Department of Justice in *Thomas* v. *Collins*, *supra*. In attacking the Texas registration statute referred to above, the Department of Justice made it clear that anonymity was basic to freedom of self-organization among workers. The following appears at pages 21 to 25 of that brief:

> "2. Interference with freedom of self-organization. (a) Anonymity. Whether the provisions of the state law interfere substantially with the right of self-organization is to be considered in the light of historical and recent experience, with which Congress has been fully familiar. It is widely recognized, and the cases before the Board show, that the participants in an organizational movement, particularly at the 'critical formative stage' (*Kansas City Power & Light Co.* v. *National Labor Relations Board*, 111 F. 2d 340, 349 (C. C. A. 8)), often take great pains to shield both the identity of the leaders and the fact that such a movement is in progress from the employer of the employees involved.[8] These precautions are taken, of course, to

[8] *Matter of Security Warehouse & Cold Storage Co.*, 35 N. L. R. B. 857, 877 ("Elaborate precautions had been taken by the Union to keep the membership campaign a closely guarded secret. The union organizers had issued instructions that no activities were to be carried on during working hours, no union buttons displayed, and no disclosure of the names of persons who had joined was to be made even to other employees who were joining"), enforced, 136 F. (2d) 829 (C. C. A. 9); *Matter of H. McLachlan & Co.*, 45 N. L. R. B. 1113, 1120-1121; *Matter of Revlon Products Co.*, 48 N. L. R. B. 1202, 1207-1208 ("In February 1941, the Union began secretly to organize the respondent's employees * * *. When these employees pointed out the failure of previous attempts to organize * * * it was decided to keep secret the identity of [those] participating in the organization activities"), enforced, July 20, 1944 (C. C. A. 2); *Matter of Century Projector Corp.*, 49 N. L. R. B. 636, 640 ("Shortly after being hired Morrison began attempts to organize the respondent's plant. He enlisted the cooperation of Persky, who in turn persuaded Decker to join with them in their effort. At first they attempted to conceal their union activities"), enforced, 141 F. (2d) 488 (C. C. A. 2); *Matter of Peter J. Schweitzer, Inc.*, 54 N. L. R. B. 813, 818 ("LaSalle was active in soliciting employees to join the Union; he did so secretively" * * *), enforced as modified, July 10, 1944 (App. D. C.); *Matter of National Container Corp.*, 57 N. L. R. B. No. 102 ("Solicitation of members proceeded quietly and secretively"); *Matter of Ohio Public Service Co.*, 52 N. L. R. B. 725, 735 ("Yingling and the others who were active in initiating the Union at the plant attempted to keep their activities from the attention of [the company officials]"), enforced, July 7, 1944 (C. C. A. 6); *Matter of Leland-Gifford Co.*, 48 N. L. R. B. 120, 125-126 ("For a period of more than a year [the employees] had been discussing the matter of 'getting the grinders together.' They had, however, exercised extreme caution in their conversations * * *. They were extremely careful as to whom they talked for fear of speaking to a 'stooge'").

avoid the possibility of reprisals by hostile employers and to secure an atmosphere in which the merits of self-organization can be considered by the employees free from restraining influences. The necessity of maintaining secrecy where it is suspected that the employer is hostile becomes evident by mere reference to the lengths to which such employers have gone to ascertain the identity of union representatives.[9]

"Interrogation and espionage are often the prelude to discrimination,[10] beatings and bloodshed.[11]

"Congress itself, in recognition that disclosure of the identity of union adherents endangers the free exercise of employee rights guaranteed in the Act, provided in Section 9(c) for the safe-guarding of anonymity by authorizing the Board to take a 'secret ballot' to determine whether a majority of the employees in a particular unit desire to be represented by a union."

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[9] [Footnote omitted.]

[10] [Footnote omitted.]

[11] [Footnote omitted.]

See also Coleman, *The Molly Maguire Riots* (Richmond, 1936), 3-4, 27.

If privacy is vital to the safeguarding of the organizational rights of workers, who can question the fact that it is indispensable to the protection of the political process. The Constitution does not deal with abstractions; it deals with realities, and a reality of the political process is that the group in power, unless restrained, seeks to eliminate opposition. If the right to engage in political activity is to be effectively protected against such attack, the exercise of that right requires freedom from compulsory disclosure.

The struggle which gave rise to the Fifth Amendment privilege against self-incrimination, upon which petitioner

also relied in resisting the committee's inquisition, likewise throws light on the content of the First Amendment.

To maintain its power seventeenth century English absolutism relied upon the Anglican establishment as upon political institutions. The Court of High Commission which was charged with the duty of eliminating heresy was permitted to become an all-powerful tribunal for enforcing political, as well as religious conformity.

The procedural device through which the Court of High Commission functioned was the oath *ex officio*. This procedure took the form of a secret inquisition in which the surmises, gossip and malice of neighbors and townsmen were used as a basis for interrogating the accused. See Lea, I *A History of the Inquisition of the Middle Ages* 407.

Compulsory disclosure of matters of political belief and political affiliation persisted in England and became the weapon of the Court of Star Chamber. It came to be increasingly used against all form of political and religious dissent.

The opposition to the use of the oath *ex officio* reached its climax in *Lilburn's Trial*, 3 How. St. Tr. 1315 (1637-1645). "Freeborn John" Lilburn refused to answer questions before the Star Chamber "concerning other men to ensnare me and to get further matter against me."

Although Lilburn was whipped and pilloried for his boldness in refusing to take "legal oath", his case led to the abolition of the Court of Star Chamber and to the statutory prohibition against compulsory disclosure in penal matters. So deeply did the revulsion against that entire procedure run that a few years later Lilburn's sentence was vacated and he was granted reparations for the punishment he had received.

One of the political demands made upon the Long Parliament was for some guaranty against compulsory testimonial self-disclosures. See "A Declaration" from *Sir Thos. Fairfax and His Counsel of War* (Pamphlet, 1647), and "The Humble Petition of Many Thousands" (3 Haller, *Tracts on Liberty in the Puritan Revolution 403*), quoted in Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination*, 21 Va. L. Rev. 763.

The struggle against compulsory disclosure was deeply embedded in the factors which led to the early emigration to America. Not only was compulsory disclosure used to effect conformity, but it was also used to harass the dissenters who had determined to leave England. See Pittman, *loc. cit.*, 763 *et seq.*, and *United States* v. *St. Pierre*, 132 F. 2d 837, 842 (C. A. 2).

As early as 1641 the Massachusetts settlors wrote into their "Body of Liberties" a guaranty against compulsory testimony. See Whittmore, *Colonial Laws of Massachusetts*, 32-61 (Liberty No. 45).

The struggle against compulsory political disclosure in this country was merged in the struggle against the royal prerogative. Thus Pittman concludes:

> "The real reason for the American insistence that the privilege against self-incrimination be made a constitutional privilege may possibly be traced to the prerogative courts of Governor and Council, which constituted the supreme colonial courts, and the proceedings instituted to enforce the laws on trade in the colonies." *Loc. cit.*, 723.

The committee's resort to compulsory disclosure to ascertain the political affiliation of petitioner and his union associates is thus flatly contrary to the Constitution and

revives the very evils which it was the purpose of the First Amendment to eliminate.[301] Nor does it answer the profound constitutional questions raised here to point to the fact that questions concern membership in the Communist Party. It would be preposterous to argue that the standards of the Constitution need not be met in the case of an inquiry into membership or affiliation with the Communist Party. In *American Communications Association* v. *Douds, supra*, this Court recognized that the enforced disclosure of membership in the Communist Party could be justified only under the most narrowly restricted circumstances and that restraints upon the political activities of Communists through enforced disclosure must meet the standards of the First Amendment. No attempt was made to justify the disclosures demanded of petitioner by constitutional standards at the hearing at which he declined to answer questions with respect to political affiliations. As we have shown, the only purpose advanced at the hearing in justification of the committee's political inquisition was the purpose of exposure, a wholly uncon-

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[301] Of course, the compulsion to answer which the resolution exacts flows from the contempt sanctions of Section 192. Still, even in the absence of Section 192 a constitutional issue would be raised by a congressional inquiry into political affiliation. The mere fact that the witness must make a public choice between answering the question and declining to answer it, improperly burdens the exercise of the right of political expression (cf. *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203). The very fact of asking a witness today whether he is a member of an organization officially branded as subversive is to exert as discouraging an effect upon his freedom of choice and the freedom of others as, for example, the interrogation of an employer concerning the union affiliation of his employee. *International Ass'n of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, 80. And the refusal to answer, even if such refusal is protected by the First Amendment, would establish the witness' "non-cooperation with a congressional committee," in itself, whatever its motivation, a potent basis for community condemnation. Such "non-cooperation" is a ground for discharge of a professor enjoying tenure from most American universities and of an employee from private employment. *New York Times*, December 10, 1953.

stitutional purpose. Nor did the government at the trial of the case attempt to introduce evidence to show that a clear and present danger of some serious substantive evil justified invasion of petitioner's constitutional right.

The Court cannot adopt the view that an inquiry into communism can ignore the Constitution. The record of the committee tragically demonstrates the fact that basic civil liberties protected by the Constitution are most widely violated under the justification of investigating communism. For the Court on this record to uphold the committee's power to force compulsory disclosures of the kind involved here would lend judicial sanction to the arbitrary power to conduct a continuing nation-wide inquisition into the political coloration of vast portions of the population falling under the committee's suspicion, from Bishop Oxnam to Robin Hood. It would validate the exposure system for use not only against the small group of organized Communists, but at the thousands whose political opposition to the administration in power makes them targets of the Communist smear and of the various forms of derived, associated and imputed guilt through which a political opposition is destroyed. The demand for an answer to the question, Are you now or have you ever been a member of the Communist Party?, is at the root of and is responsible for the committee's unconstitutional functioning. It is the committee's activities in pursuing this inquiry which have created "wide concern * * * over some aspects of the exercise of the congressional powers of investigation." [302]

D. At a minimum the Court is required to exclude from the scope of the resolution the authority to compel the disclosures involved here.

If the Court agrees with our contentions that the resolution's scope is indefinite and indefinable, it must be set

[302] *United States* v. *Rumely*, *supra*, at 44.

aside. If the Court disagrees, it must construe the resolution so as to exclude the authority to force the compulsory disclosure of the individual's political affiliations and associations.

Since the requirement that a witness make disclosures of the kind involved here conflicts with the First Amendment, *supra*, the Court must if possible and reasonable limit the resolution to avoid the conflict. *United States* v. *Rumely, supra; United States* v. *C. I. O.*, 335 U. S. 106; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355; *United States* v. *Orman, supra.* And the Court is under particularly heavy obligation thus to limit the resolution here. The Court should not, unless language compels it, sanction a construction of the resolution which would conflict with the law's protection against investigative invasion of personal and private rights and interests, especially where, as here, no legislative purpose dictates the necessity for such invasion.

As we have shown (*supra*, pp. 33-35), of all the operative terms of the resolution, the term "propaganda" is most free of ambiguity. An authorization that the committee investigate "propaganda", whatever its outer boundaries, is needlessly strained, when it is construed to give jurisdiction to the committee to center its activities not on propaganda but rather on the political coloration of individuals and organizations themselves divorced from a context of propaganda.[303]

The interrogation of petitioner in this case and of scores of others is not to identify them with propaganda but to expose them. Inquiry into propaganda has nothing what-

[303] A parallel to the situation presented here would be created if the Select Committee on Lobbying Activities had subpoenaed the "lady from Toledo" in the *Rumely* case and interrogated her not as to lobbying, direct or indirect, but as to her political affiliations and views solely because she had read or believed in the propaganda of the Committee on Constitutional Government.

soever to do with the questions asked them and the reasons why they are asked. It is, of course, true in a sense that every human being born alive is either the author of or the object of propaganda or of propaganda activities. But we are certain that not even the government will contend that this fact makes possible a construction of the resolution authorizing the committee to seek out, determine the guilt of and punish individuals and organizations.[304]

[304] The committee's departures from its basic jurisdiction are endemic. What portion of its resolution, for example, authorized it to subpoena former President Truman for the purpose of interrogating him concerning his alleged laxity in the White case? Was White a propagandist or was the former President a victim of propaganda activities?

The committee's disregard of its jurisdiction is not difficult to explain. A witchhunt cannot thrive on theological inquests into the supernatural, but needs witches. Investigations into propaganda are inadequate to create fear, nor are they politically lucrative. A subject matter such as propaganda is more or less finite and can be exhausted, but there are thousands of potential friendly and hostile witnesses. And it is far more repressive to attack individuals and organizations than propaganda, for such an all-embracing attack ensures the discrediting of a wide variety of reforms and movements for social change, as well as the most efficient intimidation of free expression.

It also must be remembered that the attack upon individuals is a convenient disguise for the committee's unconstitutional functions. The committee actually stresses that it is engaged in exposure in answer to criticisms that it is interfering with the exercise of constitutional rights. Thus when the committee is charged with investigating areas traditionally protected by the First Amendment from such investigation, it points out that it is not investigating the subject matter but merely "exposing" the individuals who function in that area. A recent example is the committee's investigation of the American clergy. When a widespread storm of protest resulted from the announcement of this proposed investigation, the chairman stated on behalf of the committee, "It was the sense of the committee that it is not to be inferred by anyone that this was an initiation of an investigation in the field of religion. It is in keeping with the committee's policy to investigate individual Communists or members of Communist front groups, wherever they might be found." *New York Times*, July 24, 1953.

Similarly when professional informers "named" various leaders of American religious life, including the Rev. John Haynes Holmes

(Footnote Continued on Page 164)

Certainly the jurisdiction of the committee cannot be enlarged because the resolution contains the phrase "propaganda activities." If the Court did not find in the comparable phrase "lobbying activities" support for the modest claims of the government in the *Rumely* case, how could that phrase serve the purpose here of changing the entire direction and emphasis of the resolution? The committee itself has on occasion wrestled with the limiting connotation of the key terms of its resolution. It has answered the problems which they pose only by ignoring or recasting them.[305]

(Footnote Continued from Page 163)

and Rabbis Judah L. Magnes and Stephen S. Wise. Congressman Clardy, acting chairman of the committee, stated that the committee was not investigating or attacking the clergy or religion, but was seeking to expose Communists "whether in the clergy, or [in the law] or any other group." *New York Times*, July 8, 1953; 5-8 *New York City Area* (1953).

[305] That we are sound in our view of the scope of the resolution is demonstrated by the committee's manipulation of its terms to justify departures from inquiry into prapaganda. The following are expressions by committee member Doyle:

> "* * * that law [Public Law 601] tells us to come to California and other cities all over the United States to make inquiry into subversive and un-American activities and communistic propaganda."
>
> 3 *Los Angeles Area* (1953), 680.
>
> "Mr. Doyle: Our duty is to uncover subversive activities, wherever they are.
>
> Miss Epstein: Propaganda activities.
>
> Mr. Doyle: The word 'propaganda' I think is not in the text.
>
> * * * * * *
>
> Mr. Doyle: I am directing your attention now to our direction that we investigate subversive activities.
>
> * * * * * *
>
> Mr. Doyle: * * * What I am calling your attention to is this: You would expect us to investigate, therefore, under Point 2 [Public Law 601], subversive activities, wherever we find them, wouldn't you?
>
> Miss Epstein: Subversive propaganda activities * * *.
>
> * * * * * *

(Footnote Continued on Page 165)

This Court cannot do either, for its duty is to construe language so as to protect constitutional rights. "With a view to observing this principle of wisdom and duty, the Court very recently strained words more than they need to be strained here." *United States* v. *Rumely*, *supra*, at 47. In this case the Court would be required to strain

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(Footnote Continued from Page 164)

Mr. Doyle: * * * We feel that the Communist Party * * * have been or are participating in subversive activities.

Miss Epstein: Propaganda.

Mr. Doyle: And propagandizing subversive activities. * * *

* * * * * * *

* * * we are asking about subversives wherever it exists.

* * * * * * *

Mr. Moulder: Do you have any knowledge concerning communistic or subversive activities whatsoever?

Miss Epstein: Are you talking about propaganda activities?

Mr. Moulder: Either one.

Miss Epstein: If you are talking about activities, I consider it outside of the scope of your inquiry. If you are talking about propaganda activities, I will stand on the Fifth Amendment. * * *"

3 *Los Angeles Professional Groups* (1953), 3926-3929.

"Mr. Doyle: * * * Under Public Law 601, the United States Congress by unanimous vote assigned each and every member of this committee * * * the obligation of investigating the extent and character and objects of subversive and un-American propaganda and activities in the United States.

* * * * * * *

Mr. Doyle: * * * You do not consider that because a man is a member of the bar he should not be questioned factually about subversive activities in the United States * * *?"

Ibid., 3937-3938.

"Mr. Doyle: * * * we are assigned to this sort of a hearing today in order to investigate the dissemination within the United States of anything that is subversive or un-American. * * * And our definite understanding is to investigate subversive and un-American conduct within our country. That is the law."

3 *Motion Picture Industry* (1951), 766.

See also: 2 *New York Area* (1953), 1254; 4 *Infiltration—Education* (1953), 1139; 2 *Los Angeles Area* (1953), 598; 3 *Infiltration—Education* (1953), 1006-1007, 1032 (at 1007, Congressman Doyle states, "I am using the exact language of Public Law 601" and defines it as "investigation of subversive activities").

words not for the purpose of avoiding a conflict with the Constitution but for the purpose of creating one.

Even if, *arguendo*, the resolution could conceivably be read to authorize disclosure of political affiliation under certain narrowly limited circumstances and in connection with a subject matter within its scope, the Court could not reject petitioner's claim to constitutional protection in this case. We have pointed out that at the committee hearing the sole justification advanced for the inquiry was the purpose of exposure. At the trial, the government claimed for the first time that the "specific purpose" of calling petitioner was to obtain information concerning the screening for security purposes of the Union's officials with a view to determining whether there was a difference in practice in this respect among various government agencies.

This purpose was alleged to be part of a continuing inquiry into the infiltration by Union officials into defense projects (R. 157). But this alleged inquiry is not even faintly related to the investigation of propaganda. Undoubtedly the remoteness of this subject matter from the area of propaganda, as well as the fact that no legislative purpose was claimed for the inquiry, led committee counsel to add that the hearing "followed the reference" to the committee of the Wood bill (see *supra*). Manifestly, mention of the Wood bill was imported into the statement of pertinency as a make-weight. It was conceded that petitioner's testimony was not specifically elicited to shed light on the Wood bill and the fact that the hearing "followed the reference" to the committee of the Wood bill did not supply a legislative purpose. Were it otherwise, any hearing, whatever its subject matter, held by the committee at any time subsequent to this reference would in the same way be sheltered by a protective umbrella of legislative purpose. Nor is it surprising that such faint claims were made for the pertinency of the inquiry to the Wood bill, for this bill was confined to barring from employment

in defense plants subversive individuals as broadly defined therein. See *supra*, note 298. The subject matter of the bill was thus divorced on the one hand from propaganda and on the other from labor unions or labor union officials.

In addition to all this, the Department of Justice at a subsequent hearing expressed its views that the bill was both unconstitutional and unnecessary.[306] And some of the

[306] Statement of Peyton Ford, the Assistant to the Attorney General of the United States:

"*March 21, 1950*

"HON. JOHN WOOD,
Chairman, Committee on Un-American Activities,
House of Representatives, Washington, D. C.

"MY DEAR MR. CHAIRMAN: This is in response to your letter of March 2 and 9, 1950, requesting the views of this Department relative to H.R. 3903 [the Wood bill] and H.R. 7595, in connection with which your committee has scheduled hearings beginning March 21.

"H.R. 3903 would forbid any United States officer or employee or 'any individual employed in connection with' national defense contracts to be or become a member of or contribute funds or services to the Communist Party or any organization designated as subversive by the Attorney General, or to advise, counsel, or urge other such persons to do or omit to do any of these prescribed acts.

"An organization would be considered subversive under the bill if the Attorney General has designated it as such under Executive Order 9835 and there has been no publication of the cancellation of the designation or, following the enactment of the bill, when 31 days have elapsed following the publication of such a designation by the Attorney General. The Attorney General is directed to take such steps as are necessary to see that all persons covered by the bill are given a reasonable opportunity to learn the names of designated organizations.

"Under the definitions contained in the bill, the term 'organization' includes foreign as well as domestic organizations; 'to contribute funds or services' includes the contribution of personal services and the promise to make any contribution, whether the promise is legally enforceable or not; and 'national defense contract' includes any contract with the United States

(Footnote Continued on Page 168)

doubts raised against the bill were subsequently confirmed by this Court in *Wieman* v. *Updegraff*, 344 U. S. 183. To petitioner's constitutional right to decline compulsory

(Footnote Continued from Page 167)

or its agencies involving the manufacture of arms or munitions for national defense.

"A penalty section subjects violators to a $3,000 fine, 3 years imprisonment, or both.

* * * * * *

"In your committee's consideration of H.R. 3903, it would seem well to bear in mind that while the courts have sustained the right of the United States Government to employ such persons as it chooses and to prescribe qualifications and place appropriate conditions and restraints upon their employment (*Friedman* v. *Schwellenbach*, 159 F. 2d 22, cert. den. 330 U. S. 838), a different situation exists when it is sought to extend such restraints to private citizens generally as contemplated in section 2 of the bill. The limitations imposed by this bill, which have the effect of inflicting punishment upon named groups without jury trial, should, moreover, be carefully considered in the light of the decision in *United States* v. *Lovett* (328 U. S. 303), where the Supreme Court construed the constitutional prohibition against bills of attainder and stated that the 'permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type' (p. 318). In this same connection, consideration should also be given to the fact that the bill contains no legislative finding that the activities proscribed present a clear and present danger to the security of the United States. In the absence of such a finding, it is doubtful that the bill would withstand a judicial test as to its constitutionality. Indeed, even were such a finding added to the bill, it is by no means certain that its constitutionality could be upheld.

"The important distinction between administrative measures to screen out disloyal employees or persons seeking employment in Government, such as are now utilized under Executive Order 9835, and legislation which would adopt, as in section 4 of the bill, such administrative designations for the purposes described in H.R. 3903, should also be carefully noted. A world of difference exists, from the standpoint of sound policy and constitutional validity, between making, as the bill would, membership in an organization designated by the Attorney Gen-

(Footnote Continued on Page 169)

disclosure there are thus opposed a resolution which does not authorize such disclosure, one investigative subject matter (screening trade union officials) which is both non-legislative and beyond the scope of the resolution and another subject matter (the Wood bill) which is beyond the scope of the resolution, not related to petitioner and unconstitutional. And dominantly motivating the entire hearing is a purpose, exposure, which is the battlecry of a new Inquisition poised to conquer the liberties of a nation.

(Footnote Continued from Page 168)

eral a felony, and recognizing such membership, as does the employee loyalty program under Executive Order 9835, as merely one piece of evidence pointing to possible disloyalty. The bill would brand the member of a listed organization a felon, no matter how innocent his membership; the loyalty program enables the member to respond to charges against him and to show, in a manner consistent with American concepts of justice and fairness, that his membership is innocent and does not reflect upon his loyalty.

"The activities of Federal employees attempted to be covered by the bill appear to be restricted adequately by section 9A of the Hatch Act (5 U. S. C. 118(j)) and by the loyalty program administered under Executive Order 9835. It is believed that the Department of Defense and the Atomic Energy Commission have also adopted certain precautionary measures covering activities of employees of those holding contracts connected with the national defense. In addition, the Smith Act (18 U. S. C. 2385) makes it a crime to advocate the overthrow of the Government of the United States by force or violence. It does not appear, therefore, necessary, even if constitutionally possible, to add to existing law and regulations at the present time a penal statute such as proposed in the bill. * * *"

* * * * * *

(*Hearings on legislation to outlaw certain un-American and Subversive Activities* (1950), 2123-2125.

POINT IV

Petitioner validly asserted the privilege against self-incrimination under the Fifth Amendment.

At the outset it should be noted that no challenge is made by the government to the availability of the privilege against self-incrimination in response to any and all of the questions which petitioner declined to answer. Indeed, the very fact that the purpose of the inquiry was "exposure" of communism in itself made appropriate the assertion of the privilege. Compare *Blau* v. *United States*, 340 U. S. 159.

A. Petitioner made a specific assertion of the privilege.

At the very first indication on the part of the committee that the witness' answers might involve association with specific individuals charged with being Communists, petitioner asserted and claimed his privilege under the Fifth Amendment. Thus the witness specifically stated (R. 168):

> "Because of the hysteria, I think it is my duty to endeavor to protect the rights guaranteed under the Constitution, primarily the First Amendment supplemented by the Fifth. This committee will corrupt those rights."

He explained to the committee (R. 167) that the line of questioning that "counsel is developing now * * * has been used on numerous occasions by this committee and other congressional committees in an attempt to harass the Union, its leadership and its members."

The court below based its ruling (R. 356) that the privilege had not been asserted upon this preliminary response alone. We submit that this response is sufficient to assert the privilege.

However, petitioner did not confine his response to the answers quoted above. He made it explicit when the committee continued to press him that the reasons for his refusal were based upon his fear that an attempt was being made, as press reports had predicted, to elicit information to be used in a criminal prosecution against him (R. 171):

> "Mr. Chairman, on these questions, which are all essentially the same, of course, when this hearing was announced according to the press reports, at least, it was announced because this committee presumably was interested in finding out things with reference to individuals in our organization by using whatever means it has at its disposal and for the purpose of trying to frame people for possible criminal prosecution."

This claim of protection under the Fifth Amendment based upon a fear of a "possible criminal prosecution" was again repeated when counsel for the committee in accordance with the committee's announced purpose of investigating the validity of the affidavit which petitioner had submitted under the Taft-Hartly Act pressed the witness on this subject. He stated (R. 194): "I further understand what the motives of this committee are, to establish a beautiful frame to hang people who try to comply with the law."

Throughout the entire course of the questioning petitioner consistently referred back to his original claim of protection under the Fifth Amendment. When petitioner responded with, "I answered that", at one point when an incriminating question was put to him, Congressman Moulder said: "You mean you refuse to answer for the same reasons you gave at the beginning." The defendant replied: "That is correct. I answered the best way I know how" (R. 194).

Thus the witness' entire testimony from beginning to end is unified by a claim of protection under the Fifth Amendment based upon the stated fear that his answers might be used against him in a "possible criminal prosecution."

This is a criminal case and presumption of innocence entitles petitioner to the protection of every reasonable doubt. More than this, the courts have from the beginning looked with disfavor upon attempts to narrow the privilege and have insisted that it be given a broad construction consistent with its fundamental purpose.

The recent decisions of the Court in (*Patricia*) *Blau* v. *United States*, 340 U. S. 159, (*Irving*) *Blau* v. *United States*, 340 U. S. 332, and *Hoffman* v. *United States*, 341 U. S. 479, underscore the fundamental importance which attaches to the privilege against self-incrimination under our constitutional system.

In the *Hoffman* case, *supra*, the Court stated (at 486):

> "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." [307]

The Court quoted with approval from *United States* v. *White*, 322 U. S. 694, 698:

> "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."

In *Feldman* v. *United States*, 322 U. S. 487, 489, it was pointed out that this guarantee against testimonial compulsion "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed."

In *Twining* v. *New Jersey*, 211 U. S. 78, 91, Justice Moody reminded the nation of the importance of the privilege in the following terms:

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[307] To the same effect is *Counselman* v. *Hitchcock*, 142 U. S. 547, 562, and *Arndstein* v. *McCarthy*, 254 U. S. 71, 72-73.

> "At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."

The privilege against self-incrimination was designed to bear an important part of the constitutional burden of making the democratic system work. As Justice Bradley pointed out in *Boyd* v. *United States*, 116 U. S. 616, 630—"a case that will be remembered as long as civil liberty lives in the United States" (Brandeis, J., in *Olmstead* v. *United States*, 277 U. S. 438, 474)—compulsory disclosure "is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."[308]

The court below rested its opinion upon the view that petitioner's use of the phrase "the First Amendment supplemented by the Fifth" did not "draw about him the pro-

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[308] In *Wood* v. *United States*, 128 F. 2d 265, 268, 278, 279 (C. A. D. C.), Mr. Justice Rutledge, while a judge of the court below, recognized the fundamental importance of the privilege to democratic government:

> "The privilege has sanction in the Bill of Rights, and before that in a long but victorious struggle of the common law. It protects against the force of the court itself. It guards against the ancient abuse of judicial inquisition. Before it judicial power, including contempt, to enforce the usual duty to testify, dissolves. No other violence or duress is needed to bring it into play than the asking of a question. It excludes response regardless of its probative value."

The court thus rebuked those who would seek to minimize and limit the importance of the constitutional privilege:

> "Men now in concentration camps could speak to the value of such a privilege if it were or had been theirs. There is in it the wisdom of centuries if not that of decades."

tecting mantle of the Fifth Amendment" (R. 356). Such a view is incomprehensible when one considers the purpose and background of the inquiry and the peril in which the committee knowingly placed the witness. Indeed, when we note that the witness expressly stated that he feared "a possible criminal prosecution," a portion of the record which the court below wholly ignored, the contention that an assertion was not made is impossible to accept.

While the court below recognized the need for a liberal construction in this area, it withheld such a construction here, pointing to the fact that the *Hoffman* case, *supra*, did not deal with an assertion (R. 357). But the liberal principles which govern the construction and application of the privilege insist than an assertion of the privilege does not require a particular form of words or the pronouncement of some talismanic formula. It is sufficient, however informal it may be, if it reasonably conveys that the witness is unwilling to answer because he may be incriminated. Indeed, "it may even be assumed in the absence of express assertion in some cases from the nature of the questions asked and the manner in which they are answered." *United States* v. *Skinner*, 218 F. 870, 880. See also *United States* v. *Elton*, 222 F. 428 (S. D. N. Y.) and *United States* v. *Eisele*, 52 F. Supp. 105 (D. C. D. C.).

Surely, of all the aspects of the privilege, the question whether it was validly exercised most requires liberality in construction. And we know of no situation which raises a stronger claim to the protection of the privilege than one in which a witness who has never been duly charged resists inquiry in the course of a preliminary investigation because of the fear of harassment and unfounded prosecution.[309]

[309] See 8 Wigmore, *Evidence*, Section 2251, 308: "The modern system of formal presentment needs no defense. In this aspect, the privilege against self-crimination is, in history and in policy, its just complement, insofar as it exempts all persons from being compelled to disclose their supposed offenses before formal process of charge is had."

Because the incriminating area embraced petitioner's political affiliation it is not surprising that he referred not only to the Fifth Amendment but to the First Amendment. But the fact that the witness also referred to the First Amendment does not operate to deprive him of the protection of the Fifth. As we have pointed out, there is a close relationship between the reasons which brought the privilege into being and the nature of the rights protected by the First Amendment. *Supra*, pp. 158-159.

If the incriminating subject matter constituted an ordinary offense such as gambling or the sale of narcotics, the protective policies of the Fifth Amendment would require a liberal construction. The incriminating subject matter in this case involves political beliefs and affiliations. The very reason for the existence of the privilege is embedded in the need for sheltering political minorities. In short, a court must construe the assertion of the privilege *more*, not less liberally, as did the court below, where as here, the incriminating subject matter trenches upon the area of political belief and affiliation.

Apart from the fact that reliance on the First Amendment is in no way inconsistent with the plea of the privilege under the Fifth Amendment, the law is clear that the reliance upon reasons in addition to possible self-incrimination cannot serve to dissolve the protection of the Fifth Amendment. In *United States* v. *St. Pierre*, 128 F. 2d 979 (C. A. 2), the leading case on this question, a witness, when asked why he refused to answer a given question stated, "it was 95 percent fear of revenge and 5 percent fear of self-incrimination." The Court of Appeals held (at 980):

> "It is immaterial that appellant's chief reason for refusing to answer was his fear of foul play. The fact that he thought himself in greater danger from the man whose name he was asked to disclose than from prosecution for crime, did not deprive him of his privilege, if any, though, it may have made him firmly determined to claim them."

This ruling was cited approvingly by the Court in *Smith* v. *United States*, 337 U. S. 137, 151.

In a number of companion cases involving officers or members of the Union, trial courts have ruled that reliance upon comparable expressions constituted valid assertions of the privilege against self-incrimination. One such case is *United States* v. *Fitzpatrick*, Criminal No. 1743-1950, 96 F. Supp. 491, involving Thomas J. Fitzpatrick, the chief steward of Local 601 of the Union. Mr. Fitzpatrick appeared before the committee (see petition in *Quinn* v. *United States, supra*), and after preliminary matters had been disposed of, stated his position in advance with respect to questions which the committee thereafter might ask: [310]

> "I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> "The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they felt that they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret, if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment."

[310] 1 *Labor Unions* (1949) 602. For the convenience of the Court we appended two supplements to our petition for a writ of certiorari this case. We make reference to them here. Supplement I is a series of unreported opinions involving the privilege against self-incrimination which were handed down by the District Court in a number of companion cases. Supplement II reproduces parallel testimony of union officers before the committee. Relevant portions of the remainder of the Fitzpatrick testimony are set forth in Supplement II at p. 29.

In his opinion in the *Fitzpatrick* case, *supra*, Judge Morris refused to permit the fact that the witness relied upon considerations in addition to those arising out of the Fifth Amendment to cancel the claim of privilege. He stated that " * * * this misapprehension [with respect to the applicability of the First Amendment] on the part of the defendant in no way vitiates his right to the protection under the Fifth Amendment if he sufficiently made such claims". The court ruled (at 493):

> "The Fifth Amendment to the Constitution provides, among other things, that 'no person * * * shall be compelled in any criminal case to be a witness against himself * * *.' The other provisions of that Amendment obviously have no relation to this controversy, and the provision mentioned is the one that has been construed to justify a witness in any proceeding in declining to answer any question that would tend to incriminate him, or expose him to prosecution for the crime. There can be no doubt that this protection extends to a witness testifying before any judicial, congressional or administrative body of the United States Government although, apparently, there has been misapprehension on the part of some that it does not. The use, therefore, by the defendant of the term 'Fifth Amendment' could only have reference to this provision therein, and unless by some explicit statement that he was not claiming the protection of that provision of the Constitution, it would seem sufficient to put the committee on notice that he was asserting such claim."

Judge Morris insisted (at 494) that the manner of the assertion cannot be divorced from the objective circumstances:

> "Where a witness, such as the defendant here, has claimed the protection of the Fifth Amendment and that in a setting in which he has been denounced, by other witnesses testifying, as a Communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a Communist organization, where the statutes then in force

> mak[illegible] it a criminal offense to do such things, and where prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the committee was put on ample notice that the defendant apprehended that the answers to the questions involved in this indictment would furnish information which could be used in the prosecution of him in a criminal case under existing federal statutes, and for that reason, as well as for other reasons which were not well founded, declined to answer the questions. *Blau* v. *United States*, 340 U. S. 159."

The circumstances which the court thus described as conveying reasonable notice that Fitzpatrick, a shop steward of a local union of the UE, claimed the privilege apply even more appositely to the situation of petitioner, the Secretary-Treasurer of the International Union, in view of the fact that the committee expressly sought to probe his affidavit under the Taft-Hartley Act.

In *U. S.* v. *Panzino*, Criminal No. 1747-1950, Supplement I, p. i, Judge Goldsborough ruled that a similar formulation constituted an effective assertion of the privilege against self incrimination. Likewise in *U. S.* v. *Matles*, Criminal No. 1745-50, Supp. I, p. 11, Judge Letts who was the trial judge in the instant case found reliance upon the First and Fifth Amendments to constitute a valid assertion of the privilege against self-incrimination.[311]

[311] The court reached this conclusion by probing "the mental operations of Representative Moulder". Judge Letts stated that the primary question was whether Representative Moulder understood the defendant's reference to the Fifth Amendment and further whether such reference adequately conveyed to the Representative that the defendant was invoking his constitutional privilege against self-incrimination. In order to justify the acquittal in the *Matles* case, in the face of the conviction here, Judge Letts ruled that, though the language used by the witness was inadequate to convey an assertion, Representative Moulder nevertheless managed to grasp that an assertion had been made. In reaching this conclusion, Judge Letts pointed to the fact Representative Moulder, upon being told that the witness relied on the First and Fifth Amendments (Supplement I, p. 13),

(Footnote Continued on Page 179)

B. Petitioner did not abandon, waive or disclaim the privilege.

When the questioning of petitioner turned to the identification of particular individuals, the witness refused to answer upon the ground which we have already discussed. The committee then continued to press the witness with questions along the same line. The witness, thus pressed, reasserted the privilege and voiced his fear, as press reports had indicated, that the committee was seeking to incriminate him on the basis of the Section 9(h) affidavit of the Taft-Hartley Act. After he thus gave a clarification of the reasons for his refusal to answer, Repre-

(Footnote Continued from Page 178)

"then inquired 'In what respects do they justify your refusal to answer the question'. And the defendant replied: 'I am so advised by counsel.' At this point Mr. Scribner, counsel for the defendant, who was present, volunteered: 'I will be happy to give the basis for that if you wish, Mr. Congressman'."

The court concluded upon the basis of the above colloquy that since "the suggestion of defendant's counsel was not adopted and he was not invited to explain further the position of the defendant in relying upon the First and Fifth Amendments", therefore, "Representative Moulder understood the position of the defendant and the purpose of the objections that had been made."

But this is the same Representative who only a little while earlier had heard petitioner, the witness immediately preceding Matles, use almost the same language to claim the privilege. If he was aware that the words "First and Fifth Amendments" constituted an assertion, he must have had a similar awareness when the witness Emspak used the expression "the First Amendment supplemented by the Fifth."

The inescapable fact is that the words which the witness Matles used, in the context of the objective circumstances, were adequate to convey the assertion and that similar words and circumstances require the same conclusion here. There is no basis whatsoever for attributing to Representative Moulder a comprehension of what was being claimed in the *Matles* case and an ignorance of what was being claimed in the instant case. Indeed the record in this case contains a more explicit indication than is presented by the *Matles* record, that Representative Moulder knew that the witness had claimed his privilege. See R. 191.

sentative Moulder persisted in exploring the validity of the affidavit and in seeking an explanation for an answer which on its face expressed the fear of criminal prosecution. He asked the witness (R. 172):

> "Do you mean to say you have people in your organization who have information that would subject you to criminal prosecution?"

The witness answered: "No." However, he was not permitted to complete his answer and was again pressed to incriminate himself by identifying particular individuals.

Representative Moulder then again asked (R. 172):

> "Is it your feeling that to reveal your knowledge of them would subject you to criminal prosecution?"

The witness thereupon replied (R. 172):

> "No. I don't think this committee has a right to pry into my associations. That is my own position."

The court below gave conclusive effect to this last answer as a disclaimer of the privilege (R. 357).

But the court could not attribute to this answer a significance which dominates and indeed overrides the remainder of the witness' testimony and its context. As we have noted, Judge Kirkland had ruled that all of the questions addressed to the petitioner were parts of a single line of inquiry. *Supra*, p. 10. If the questions addressed to petitioner cannot be considered in isolation from the entire inquiry, neither may the answers. Since all of the questions considered together establish the availability of the privilege in response to a particular question,[312] the an-

[312] Compare *Bowers* v. *United States*, 202 F. 2d 447, 452 (C. A. D. C.): "We seriously doubt whether the 'Do-you-know-a-certain-person' question, without more, can ever be said to be pertinent for the purposes of a criminal prosecution under § 192."

swers to all of the questions constituting the entire line of inquiry must likewise be considered together to determine whether the privilege was in fact claimed.

An examination of the entire line of inquiry establishes that petitioner intended to assert the privilege and that he in fact asserted the privilege. Thus, when the witness asserted his privilege in response to an incriminating question with respect to Joseph Persily, he was asked precisely the same kind of question with respect to another Union organizer, Albert Smith (R. 170). Although the witness referred back to his earlier answer in declining to answer the question concerning Albert Smith, he was nevertheless asked whether Max Helford had ever been connected with the UE as a field organizer (R. 171). It was in response to this third attempt to incriminate him that the witness made explicit the basis for his claim of privilege, namely, the fear of criminal prosecution for perjury (R. 171).

When the pattern of the questioning revealed that petitioner was being asked to identify individuals who had been accused by the committee of being Communists, he charged that all of the questions which had been put by the chairman were motivated by the Committee's purpose to identify individuals as Communists for possible criminal prosecution under the affidavit provisions of the Taft-Hartley Act. He suggested that the questions bore out the press reports which have already been referred to and which announced that such would be the purpose of the interrogation. He stated his refusal to permit himself thus to be victimized (R. 171): "I think I have the right to reserve whatever rights I have in that respect to whatever appropriate bodies may be set up to deal with questions that come up."

Although petitioner thus expressly stated the basis for his claim of privilege and of his fear, Representative Moulder persisted in arguing with petitioner in an obvious

attempt to force out of him the incriminating information which the committee sought. It was in response to this attempt to probe further into the basis for the claim that the witness gave a negative reply upon which the government relies.

Before the petitioner left the stand, Representative Moulder stated to him (R. 191) that he had not been denied any constitutional rights or privileges and that he had not been "accused of anything". Representative Moulder thus sought to reassure the witness that his fears were groundless and that his constitutional rights to be free of self-incrimination had not been invaded. The committee thus patently recognized that petitioner had asserted the privilege and that he had not abandoned it, for if the committee was under the impression that the witness had not relied upon the privilege it would hardly have become necessary to tell him that he had not been accused of anything.

A significant colloquy terminated the line of inquiry. The witness was bluntly asked whether he had recently signed a non-Communist affidavit with the NLRB, and was thereafter asked whether he was a member of the Communist Party. In response to this apparent attempt to lay the basis for a perjury charge against the witness, petitioner communicated in unmistakable language his fear that the inquiry was designed to lay the basis for a perjury prosecution (R. 192-193).

Despite this clearly communicated expression of fear, the committee, pursuing its earlier tactics of attempting to wring admissions from petitioner's assertion of the privilege, nevertheless asked him whether he was a member of the Communist Party at any time before he signed the affidavit, whether he ever paid Communist Party dues, whether he ever signed an application to join the Communist Party, whether he ever registered as a member of

the Communist Party, and whether he ever attended the trial of Earl Browder at the Communist Party headquarters in New York City. To all of these questions the witness simply replied: "I answered that." When the committee asked: "You mean you refuse to answer for the same reasons you gave at the beginning?" petitioner replied: "That is correct. I answered the best way I know how" (R. 194). Thus, petitioner concluded his examination with a reliance upon the same assertion which he made when the committee first touched upon the incriminating subject-matter.

The record, which must be taken into account in its entirety, thus defeats the government's contention. It is simply impossible to contend that the petitioner's answer to a single question which considered in isolation lacks pertinency, overcomes and destroys the meaning of his asserted fear of prosecution made when the ultimate facts—which alone could give the initial questions pertinency—were sought to be elicited. It was in his response to these key and controlling questions, incriminating on their face, that petitioner expressed his fear of criminal prosecution and referred back to his initial reliance upon his Fifth Amendment privilege.

In addition, the committee had no right to put the questions once the privilege had been validly claimed. A claim of privilege cannot be frustrated or retroactively destroyed by converting the inquiry into an endurance contest. Once the setting of peril appears, the claim must be respected and cannot serve as an invitation to circumvent it by guile or persistence. Nor is a prosecutor free, after an assertion is made, to probe the reasons underlying the assertion. For answers to such questions *pro tanto* leads to a sacrifice of the privilege. See *Hoffman* v. *United States*, *supra*; *United States* v. *Weisman*, 111 F. 2d 260 (C. A. 2), and *Hashmall* v. *United States*, Supp. I, 25. This Court cannot

sanction an attempt to invade the privilege in order to justify an attack upon its assertion.

Apart from all of the above considerations, the answer in issue cannot serve to negate the claim. It might well have been true that acquaintance with the two named individuals would not have directly subjected the defendant to criminal prosecution. The Fifth Amendment protection is, of course, more extensive. As the Court stated in *Blau* v. *United States, supra:*

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial."

As long as "answers to the questions asked * * * would have furnished a link in a chain of evidence needed in a prosecution of petitioner," the Fifth Amendment protection was available to petitioner. *Blau* v. *United States, supra.* And the answer is equally consistent with the fear of a "frameup" of an unfounded prosecution which petitioner voiced both before and after the colloquy in issue.

The case law dealing specifically with comparable claims with respect to insufficiency, absence or waiver of assertion condemns the government's contention here. In *U. S.* v. *Eisele*, 52 F. Supp. 105 (D. C. D. C.), involving a claim of immunity under a statute, the prosecution denied that the defendant had in fact claimed his privilege, and in addition alleged that "whatever claim was asserted it was subsequently withdrawn." The contentions advanced were thus identical with those urged here. Judge Pine rejected these arguments and upheld the defendant's assertion.

This Court has erected safeguards restricting the constant attempts of government prosecutors to evade prohibitions of the Fifth Amendment by seeking to spell out of a defendant's conduct a "waiver" or "withdrawal" of the privilege. The Court has insisted that there can be no waiver of the claim of Fifth Amendment protection by a

witness unless through his testimony in that proceeding the witness' voluntary testimony constitutes an admission or showing of guilt. *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355. See, also, *Smith* v. *United States*, 337 U. S. 137; *Rogers* v. *United States*, 340 U. S. 367; *United States* v. *St. Pierre*, 132 F. 2d 837 (C. A. 2). The courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights," *Johnson* v. *Zerbst*, 304 U. S. 458, and may not "presume acquiescence in the loss of fundamental right," *Glasser* v. *United States*, 315 U. S. 60. In the latter case the Court held (at p. 70):

> "To preserve the protection of the Bill of Rights for hard-pressed defendants we indulge every reasonable presumption against the waiver of fundamental rights."

In respect specifically to an alleged waiver of the Fifth Amendment protection against self-incrimination, the Court ruled in *Smith* v. *United States*, 337 U. S. 137, 150:

> "Waiver of constitutional rights * * * is not lightly to be inferred. A witness cannot properly be held after claim to have waived his privilege and consequent immunity upon vague and uncertain evidence."

In that case the petitioner appearing before an OPA examiner asserted his general claim of protection under the Fifth Amendment and asked for immunity under the applicable immunity statute. During the course of the examination the petitioner made certain statements in an answer. The record then read:

> "Question: This is a voluntary statement. You do not claim immunity with respect to that statement?
> "Answer: No."

Mr. Justice Reed said:

> "In view of the specific claim of privilege, it seems unlikely that petitioner would waive the privilege

and testify * * *. No question is made as to the correctness of the transcription. Without any effort to clarify the 'no', the examiner went ahead and * * * the subsequent answers were considered by the examiner to be voluntary. *We do not think under these circumstances this equivocal 'no' is a waiver of the previous definite claim of general privilege against self-incrimination.*" (Emphasis supplied.)

In *United States* v. *St. Pierre*, 128 F. 2d 979 (C. A. 2), the defendant had answered in response to questions by the United States Attorney that "his answer would give the United States Attorney no clues or leads to his commission of a Federal crime." The holding of the court on this point which was cited approvingly by Mr. Justice Reed in the *Smith* case, was (at p. 980):

> "Nor is it material that appellant stated at several points that he had committed no federal crime; such a contradiction, especially by a nervous or excitable witness would not overcome a clear claim of privilege if he was otherwise entitled to the privilege."

See also *McCarthy* v. *Arndstein*, *supra*.

In *United States* v. *Weisman*, *supra*, a witness who had appeared before a grand jury, asserted his Fifth Amendment protection, but then answered certain of the questions which he had previously refused to answer on constitutional grounds. Judge Learned Hand, in reversing the conviction, stated:

> "These answers the prosecution urges as an abandonment of the privilege; but we agree with the defendant that they were slips and not really intended as an abandonment."

In *Wood* v. *United States*, *supra*, Justice Rutledge wrote in respect to a supposed "waiver" of the Fifth Amendment protection by defendant,

> "Basic constitutional protection, especially, in criminal cases, should not be suspended by mere inference

from indifferent facts or doubtful presumptions, whether of law or fact."

In the light of the foregoing principles, it is impossible to read a disclaimer, abandonment or waiver of the privilege by petitioner in the present proceeding out of his single answer to one question in the course of the entire proceeding.

POINT V

Issues arising out of the failure of the committee to direct petitioner to answer the questions involved here.

A. Petitioner was not directed to answer the questions put to him.

Even if petitioner had no right to refuse to answer the questions listed in the indictment on his Fifth Amendment ground, he could not be convicted for refusing to answer the questions.

The record shows that petitioner was not directed to answer any questions after he made his Fifth Amendment claim. At no time did Representative Moulder or Committee Counsel Tavenner direct petitioner to answer either upon the ground that the refusal was not considered constitutionally privileged or upon the ground that the privilege had not been properly asserted, or that the First Amendment did not support his objections. If in the view of the committee the privilege was not available to the witness or the assertion had not been satisfactorily made, or his objections were not protected by the First Amendment it was required to direct the witness to answer. It is the disobedience of the direction to answer which forms the basis of the contempt, and in the absence of a direction the initial refusal is not a matured, punishable refusal since there is no basis for the indispensable finding of intent

to violate the statute. Compare *Quinn* v. *United States*, *supra*.

There are a large number of circumstances under which the mere failure to answer a question put by a congressional committee is not in itself a sufficient basis for invoking the criminal law. It would serve no purpose exhaustively to analyze all of these circumstances here. It is sufficient to state that one of these circumstances comes into being when a witness raises serious objections to answering.[313] A majority of the court below recognized—and this wholly apart from whether petitioner asserted the Fifth Amendment privilege—that petitioner's objections were of an order which required some dispositive action by the committee before he could be held in violation of the criminal law.

The classic manner in which congressional committees reject the objections of a witness has been by specifically directing the witness to answer. When in 1857 Congress enacted the contempt statute to supplement its inherent powers the practice had been either explicitly to direct the witness to answer or to inform him in comparably clear terms that a refusal would result in contempt proceedings. Section 192 of Title 2 of the Criminal Code punishes every person who "refuses to answer". The legislative history of Section 192 establishes that in passing the statute Congress did not intend to confer new powers upon congressional committees or inflict any additional burdens on witnesses. See the concurring opinion of Judge Bazelon in *Quinn* v. *United States*, *supra*, at 33-34; *supra*, note 294. Therefore, the term "refusal" must be construed to contain within it the prerequisite of a direction or an explicit warning that contempt might ensue in the event of a failure to answer the question.

[313] Compare *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, and *Bowers* v. *United States*, *supra*.

In three district court cases, the court has assumed that a direction to answer or its equivalent is a prerequisite to contempt. In *United States* v. *Browder*, D. C. D. C., Criminal No. 1784-50 (March 14, 1951), the court, in acquitting the defendant of contempt of Congress, said:

> "A search of the record will not disclose one instance when the committee or its presiding member overruled the defendant's objections (based on pertinency) or offered to set him right if, perchance, his observations were ill founded or his position untenable in the eyes of the committee.
>
> "His objections were not acted upon and he had the right to believe that his views and explanations were acceptable to the Committee."

This view was followed in *United States* v. *Fox*, D. C. D. C., Criminal No. 1798-50 (June 29, 1951), where the court observed that "there is no reason why a different procedure (from that pursued in the courts) should be permissible in cases involving contempt of Congress."

And again in *United States* v. *Kamp*, 102 F. Supp. 757 (D. C. D. C. 1952), the court declared:

> "Committees of Congress must conduct examinations in such a manner that it is clear to the witness that the committee recognizes him as being in default * * *. The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any reasonable explanations given by the witness, and then to rule on the witness' response."

See also *Bryan* v. *United States*, 339 U. S. 323.

Perhaps the most compelling indication that the congressional committees translate their obligation to overrule objections to questions into a direction to answer is the current practice of the committees themselves. Thus the Senate Judiciary Committee and the House Un-Amer-

ican Activities Committee now follow this practice."[11] The ruling of the court below will inevitably invite an abandonment of this practice.

We do not insist that the word "direct" must necessarily appear in the requirement that the witness answer—other terms may serve the same purpose. But we do contend that the direction must be clear and explicit. Such a requirement is not unreasonable in view of the fact that congressional committees have already adopted this formula in giving effect to the direction requirement. That a lesser standard fails adequately to protect the witness is demonstrated by the decision of the court below.

B. The record does not sustain the conclusions of the court below on the "direction" issue.

We believe that the court below was required to reverse the conviction because the committee did not explicitly communicate to the petitioner that he was required to answer. The substituted standard of the court below (R. 361) that it must appear that petitioner was apprised that his questioner rejects his objections and intends that he answer, fails adequately to protect the witness. As we have shown (*supra*, pp. 141-143) when the witness is called to the stand in a proceeding of this kind, he needs the assurance of the most explicit standards to protect him against the invasion of his rights under the Constitution. The requirement that the direction be explicitly communicated at least gives the witness some simple, recognizable formula whereby he can determine whether to answer or stand on his rights.

That the standard which the court applied is a standard in name only is apparent from the manner in which it was administered (R. 356). The concurring opinion simply states that petitioner "was made aware" that the committee

[11] *Hearings Before the Sub-Committee to Investigate the Administration of the Internal Security Act and other Internal Security Laws* of the Committee on the Judiciary, U. S. Senate, 82nd Cong., 1st Sess. (1951), 75-76 and the concurring opinion of Judge Bazelon on the *Quinn* case, *supra*, at 35 and *supra*, note 111.

desired his answers despite the grounds advanced for refusing (R. 361). But no evidence at all was offered in support of this conclusion.

It appears to us that the court failed to apply to the direction requirement the same standard of explicitness which it imposed upon petitioner's assertion. We submit that on this record it cannot be said that the committee's rejection of the petitioner's contentions was in any way communicated to him. If constitutional rights are valuable rights, they should not be lost in the shuffle of colloquy. Yet the government's argument that petitioner was apprised that his objections were rejected is based only upon the thesis that he was asked other questions which raised the same objections. Certainly, this Court should not acquiesce in a view which would require that the witness' rights before congressional committees be asserted with an overpowering roar, but would permit the committee's responsibilities in protecting his rights to be discharged by an indistinguishable mumble.

C. The court below should at least have remanded the case to the trial court with instructions to acquit.

At a minimum, it was required that the issue be resolved by the trier of fact. The issue involves a central question in the case, namely, the intent of petitioner. Thus, in the *Quinn* case, *supra*, the lower court ruled that, "The deliberate and intentional character of the refusal is an element of the offense, to be determined from all the circumstances by the trier of the facts." 203 F. 2d at 25.

An examination of the record of the proceedings in this case reveals that the trial judge in no way considered or applied this guiding rule of law. The opinion of the trial judge demonstrates beyond any doubt that the trial judge did not apply this rule. The trial judge was under the impression that a mere refusal to answer was sufficient to constitute an offense under the statute. He did not consider

at all whether petitioner "was aware of the intention of his inquirer that answers were required despite his objections." 203 F. 2d at 25. We do not understand how a "general verdict of guilty" (R. 361) erased the obligation of the court below to remand with instructions to apply the correct rule of law.

The opinion of the trial judge in enunciating the principles which he followed in arriving at the verdict of guilty cannot be disregarded. If the trial had been by jury, the instructions of the judge would have required reversal and remand on this issue. Since the trial was without jury, the opinion of the judge stands as a statement of the principles which guided him in arriving at the verdict. While in this opinion the trial judge (R. 284) made a series of findings on what he considered to be the essential ingredients of the offense, he did *not* make a finding that petitioner "was aware of the intention of his inquirer that answers were required despite his objections." The issue is not whether there is any evidence in the record which could have supported such a finding by the trial judge. The fact of the matter is that the trial judge made no such finding; he never considered the issue. Petitioner is entitled, as the court below pointed out in *Quinn*, to a trial on all of the material elements of the offense by the trier of the facts and not by an appellate court. And he must be acquitted by the trier of the facts unless *all* the material elements are found against him beyond a reasonable doubt. Compare *Bollenbach* v. *United States*, 326 U. S. 607, and *Weiler* v. *United States*, 323 U. S. 606.

In summary, we submit (1) the court below applied an improper standard on the issue of direction; (2) at a minimum a new trial should have been granted and the case remanded so that the trier of the facts might apply the standard which the court did apply, and (3) even if it was appropriate for the court below to rule on this issue for the first time, the court erroneously concluded

that petitioner was made aware of the intention of the committee that he answer despite the grounds he advanced for refusing.

CONCLUSION

For all of the foregoing reasons, the judgment of conviction must be reversed and the indictment dismissed.

Respectfully submitted,

DAVID SCRIBNER,
11 East 51st Street,
New York City,

FRANK J. DONNER,
ARTHUR KINOY,
104 East 40th Street,
New York City,

ALLAN R. ROSENBERG,
416 Fifth Street, N.W.,
Washington, D. C.

Attorneys for Petitioner.

Of Counsel:

DAVID SCRIBNER,
DONNER, KINOY & PERLIN,
by FRANK J. DONNER,
ARTHUR KINOY,
104 East 40th Street,
New York City.

APPENDIX

Statements of Prominent Americans Critical of the House Committee on Un-American Activities.

From the inception of the house committee leaders in American life have criticized its operations, its standards and its methods. The following are excerpts from but a few of a large number of such critical statements:

1. Robert E. Cushman, "Civil Liberty and Public Opinion." *Safeguarding Civil Liberty Today.* The Edward L. Bernays Lectures of 1944 given at Cornell University, 99-100.

> "In any comment on the growth of this attitude of intolerance, this smug assumption that our civil liberties really belong only to the respectable and the orthodox, one cannot ignore the sinister influence of Martin Dies, from 1938 to 1944 chairman of the House Committee to Investigate Un-American Activities. He contributed two ideas to official and unofficial thought and action in the field of civil liberties. These have taken deep root in wide sections of the public opinion of the country, and the result has been an exceedingly dangerous confusion of mind which I regard as a serious threat to American democracy.
>
> "Mr. Dies' first and most conspicuous contribution has been to make intolerance synonymous with patriotism. He set out, it is true, to expose genuinely dangerous and subversive people who were an actual menace to the public security. He did expose some, although it now seems clear that our very efficient Federal Bureau of Investigation would have dealt with all of these people quite competently without help from Dr. Dies. He then embarked upon a systematic campaign to suppress freedom of political and economic opinion. This campaign moved under the banner of Americanism; and the opprobrious epithet 'un-American' was applied to all those who indulged in any open criticism of our existing institutions, our so-called American

way of life, or of Mr. Dies. In short, good loyal American citizens who ought to know better were persuaded to give their support to the suppression of free speech and free press on the grotesque theory that they were thereby showing their loyalty to the basic principles of American democracy. Bigotry was made not merely respectable but notable. By the skillful use of labels, or slogans, American public opinion was inoculated with the dangerous idea that true Americanism consists in the stalwart defense of the *status quo* and the suppression of those dangerous and disloyal people who are unpatriotic enough to want to criticize it or suggest any change in it."

2. Statement by Dean Christian Gauss and Hadley Cantril, Leo P. Crespi, Philip A. Crowl, Charles C. Cumberland, Frank D. Graham, William Ebenstein, Kenneth W. Hechler, Jeter A. Iseley, Alpheus T. Mason, Willard Thorp, R. D. Welch, and H. H. Wilson of the Princeton faculty concerning the Hollywood investigation of the House Committee on Un-American Activities, 1947.

"The issue brought into national focus by the House Un-American Activities Committee's investigation of Hollywood is not Communism. It is the old issue of Civil Rights, Rights inherent in the American conception of democracy and guaranteed to every American citizen by the Constitution of the United States. We protest against the Committee's flagrant violation of these rights."

3. Bosley Crowther, *The New York Times*, June 8, 1947, II, p. 1.

"The recent Hollywood hearings, at which certain handpicked finger-men and stars allegedly informed the House Committee of 'dangerous Communist influences' in our films, were much more disturbing than funny, as some complacent gentlefolks have quaintly claimed, and it is amazing that they have not been

resented by industry leaders with open alarm. On the basis of arbitrary statements which the committee chairman chose to release, millions of newspaper readers have had their minds infected by the thought that Hollywood is crowded with 'Red' schemers, in every studio and every swimming pool, needling their Communist propaganda into movies and corrupting the political thinking of tycoons.

"And, as though this unreasoned suspicion were not sufficiently inimicable to the screen, casting upon it another of those familiar invidious slurs, there would seem to be cause for the leaders to resent something else very much. That is the questioning of their privilege under the Constitution to make pictures as they choose. By giving particular circulation to i nuendoes that the industry—or certain producers in it—had made un-American films, the committee cut loose covertly at the inalienable freedom of speech. It introduced the shadow of political censorship, which the men of the motion picture industry should challenge at the drop of the first hint."

4. President Truman, on September 22, 1948, denounced the committee as "more un-American than the activities it is investigating." *New York Times*, September 23, 1948.

5. President Roosevelt on October 25, 1938, assailed the Committee for intervening in the election of Governor Murphy of Michigan. President Roosevelt stated (*New York Times*, October 26, 1938):

"I was very much disturbed. I was disturbed not because of the absurdly false charges made by a coterie of disgruntled Republican office holders against a profoundly religious, able, and law-abiding Governor but because a congressional committee charged with the responsibility of investigating un-American activities should have permitted itself to be used in a flagrantly unfair and un-American attempt to influence an election.

"At this hearing the Dies committee made no effort to get at the truth, either by calling for facts or by allowing facts and personal opinion on the other side.

"On the threshold of a vitally important Gubernatorial election, they permitted a disgruntled Republican judge, a discharged Republican city manager, and a couple of officious police officers to make lurid charges against Governor Frank Murphy, without attempting to elicit from them facts as to their undeniable bias and their charges and without attempting to obtain from the Governor or, for that matter from any responsible motor manufacturer, their version of the events."

6. Hadassah, women's Zionist organization, at its convention, October 27, 1953 adopted a resolution opposing congressional methods:

"* * * which, though they may be intended to protect our way of life, limit freedom of speech and expression, attempt to control thought and interfere with free exchange of opinion" (*New York Herald Tribune*, October 28, 1953).

7. Protestant Episcopal Bishop Donegan, in a speech reported in the *New York Times*, May 13, 1953, referring to the congressional anti-subversive committees, attacked the "spurious patriotism whose main intent seems to be to investigate anyone who does not fit into their pattern of narrow-minded outlook."

8. *National Council Outlook*, official journal of the National Council of Churches, in its issue of May 1953, said:

"If it is important to detect a conspiratorial Communist who wears the robes of a clergyman, it is equally important not to confuse a 'liberal' Christian or honest advocate of social reform with Communists. This is something which is now happening in an alarming and inexcusable degree.

"The latest shocking illustration is the case of the House Committee on Un-American Activities and the

Right Reverend Henry Knox Sherrill, presiding bishop of the Protestant Episcopal Church. * * * The allegation against him is that he was a sponsor of a congress of Soviet-American Friendship, and the reader is left to assume that this means a reprehensible pro-Communist attitude. But now note the facts which the document of the Committee on Un-American Activities wholly omits. The date of the sponsorship was 1942, when the U. S. A. and the U. S. S. R. were allies in arms, and when it was a patriotic duty to support the war. * * *

"The case of Bishop Sherrill is not an isolated one. There are hundreds of other clergymen who have been treated with similar unfairness and similar un-American procedures. * * * Such an irresponsible procedure as that which we have described above is a grave disservice to our nation, and must be resolutely opposed. It contributed to a mood of hysteria and to a confusion of mind in which people can no longer distinguish between communism and honest social criticism in the old-fashioned American way.

"To confuse non-conformity with disloyalty, or efforts at constructive social progress with subversion, is to undermine the very American freedom which we seek to preserve. It is also to play into the hands of the enemies of the American way of life."

9. *Christian Register*, in its issue of May, 1953, stated:

"The internal threat to this country is the misappropriation of the investigating rights of congressional committees. Instead of doing their proper task of investigating for the purpose of making law, they take on the coloring of judicial and executive procedures.

"Why are these little men dissatisfied with the appropriate defense against conspiracy which resides in law, in court, in executive power? Do they distrust constitutional government, or do they distrust the personnel of the vast majority of the Congress who do not join wtih them? Do they distrust the judiciary, the President?

"Whether their distrust be real or feigned, they spread a fear amongst the people, and that fear must be resisted if communism is to decrease and the lawful governments of free men are to remain secure."

10. Former Attorney General Francis Biddle, wrote in *The Fear of Freedom* (1951):

"The committee's activities have helped to create a state of distrust, of prejudice, and of suspicion touching at times on panic. The committee has suggested that vast spy rings were active throughout the country, hinted at revolutionary movements, insisted that our government was infiltrated with Reds. It has charged that our institutions were contaminated by subversive and treasonable propaganda in public service, labor unions, schools, theaters, moving pictures—even in our churches.

"Due process of law was not considered by the committee to have any place in congressional investigations. At the beginning Dies announced that he was going to take a 'dignified plane' for the investigation—he was going to have no 'shooting in the dark * * * no star chamber proceedings.' Charges must be supported by facts. In practice, however, the hearings took the form of inquisitions. Trial by publicity implemented guilt by association" (at 114-115).

"There can be little doubt that those members of the Un-American Activities Committee who were in control of its policy and methods (usually the chairman, but seldom without support from other members who shared his conception of 'Americanism') utilized its investigations and reports for definite political ends. The committee was anti-Labor, anti-Liberal, anti-New Deal—and frankly so. It attacked at one time or another Frank Murphy, Harold L. Ickes, Frances Perkins, Aubrey Williams, James Lawrence Fly, Mordecai W. Johnson, Leon Henderson, Shirley Temple, Edward U. Condon, The American Society for International Law, the National Labor Relations Board, the Bituminous Coal Commission, the Board of Economic Warfare.

"When Frank Murphy was running for Governor of Michigan in 1938 the committee arranged for the introduction of evidence, at a hearing fixed a few weeks before the election, that the sit-down strikers in Michigan had been instigated by the Communist Party" (at 117).

"It is worth taking a look at this incredible performance [the 1947 Hollywood investigation], because it illustrates the power and influence of the committee, and at the same time its futility; brings to the surface its shoddy standards of Americanism based on fear and confusion, and its ideology of mediocrity and obscurantism; and displays the techniques of publicity and unfairness which the American public has come to expect in congressional investigations.

"The hearings show the absurdity of the committee's yardstick—*un-American activities.* The phrase itself is meaningless and sterile, reflecting the timid longing to be correct, an attitude at its best as depersonalized as the culture of Hollywood to which the investigation was directed, at its worst, narrow, dark, and brutal. Jean-Paul Sartre has suggested that we are engaged in asking ourselves whether we are American enough, afraid of being less American than our neighbor, trying to live up to the level of his commonplaceness. 'There are no rules or regulations,' wrote André Visson, 'for remaining an Englishman, a Frenchman, an Italian, or a Swede. There are no committees on un-English, un-French, un-Italian, or un-Swedish activities.'

"The committee's antics in the Hollywood investigation presented an extraordinary spectacle. Representative J. Parnell Thomas, a Republican from New Jersey, was the chairman. He exhibited his impartiality by announcing, at the opening of the hearings, before any testimony had been given, that there was 'no question that there are Communists in Hollywood'" (at pp. 124-125).

11. The National Council of the Churches of Christ in the United States of America on March 11, 1953, issued the following statement (*New York Times*, March 12, 1953):

"Free ministers in free pulpits, preaching to free people the liberating truth of Christ, are a chief bulwark of American freedom and the best guarantee of its future. This freedom must be maintained. Certain methods, however, of congressional committees investigating Communist activities in educational institutions endanger the very freedom which we seek to preserve.

"Congress has the right and duty to make such investigations as may be necessary to secure the information upon which sound legislation may be based. Conspirators in any area of life who seek the violent overthrow of the government of the United States should be discovered, tried in American tribunals, and, where found guilty, punished.

"No witness at any investigation should be denied fair and dignified treatment. Having sworn to tell the truth, the whole truth and nothing but the truth, he should be permitted the right of an uninterrupted initial statement of reasonable length, since unlimited right of cross-examination by all members of the investigating committee is allowed.

"No committee should circulate on its letterhead, over the signature of its members or employees, unsupported charges against individuals or organizations which it has made no effort to investigate or substantiate.

"The proper and essential function of congressional investigations must be preserved. It must be jealously guarded against abuse through methods that are now bringing it into disrepute.

"At this moment, when national unity based upon mutual confidence is of paramount importance to our security, men in responsible positions must not, through unsubstantiated charges and blanket indictments, destroy confidence in our American schools, colleges and universities. To do this would be to play into the hands of the Communists.

"There should be no encroachment upon the sound American pattern of local control of schools. Na-

tional regimentation, whether of business, of labor, of religion, or of education, is abhorrent to Americans. No regimentation is more dangerous than that of the mind.

"The control of our educational institutions, in keeping with the American voluntary principle as opposed to statism, is not a function of congressional committees, but is properly vested in boards of trustees and of education selected for that purpose. These boards must exercise the responsibility of dealing with the occasional subversive within their institutions."

12. The Very Rev. James A. Pike, dean of the Cathedral of St. John the Divine, New York, in his May 17, 1953 sermon said:

"The Ascension of Christ has a message for us in the present peril we are in from the abuse of the congressional investigatory power.

"How can churchmen best counteract the present unwarranted assaults, threats and fulminations of the un-American Activities Committee? They can of course quite properly protest the un-American character of this committee's procedures, its trial by press and television, its reversal of the principle that a man is innocent until proven guilty. One reason why it has been possible for these congressional smearers to highlight particular Christian leaders is that the church as a whole has been increasingly silent in recent years about the social application of Christianity, leaving those still so concerned in a conspicuous and 'exposed' position. The church has been in retreat in its social gospel—from fear of reprisals and from the confusion which has been engendered by the world communist threat. Let the church rise to its responsibilities to bring a critique on unrighteous conditions in our land, and we will demonstrate that there is a healthy ferment that is by no means communistic and in fact is the best defense against communism, because it addresses itself to the conditions that breed communism. We will thus so surround our brethren who are being smeared (like Bishops Oxnam and Sherrill) that there will be confusion in the smearers'

camp—for they will know that they cannot investigate us all, and if they try to smear us all they will be made ridiculous in the public eye." (Reprinted in *The Churchman*, June 1953.)

13. *Congress Weekly*, published in New York by the American Jewish Congress, ran an editorial, "The Challenge to McCarthyism," May 11, 1953, which stated:

"The three high priests of McCarthyism—Senator McCarthy himself, Senator Jenner and Representative Velde * * * have secured unrestrained control of the power of congressional investigation, which they are using as an inquisition, to pry into men's thoughts and beliefs, to ferret out the dissenter and non-conformist, and to terrorize any American whose views are not approved by the unholy trinity of McCarthyism.

"In the midst of this roaring wilderness of political atavism, where the very air is filled with bombast, menace and threat, there has been a dismaying silence on the part of political figures whom Americans have always regarded as bold and passionate defenders of traditional American liberties and rights. This ignominious silence is itself a measure of the abyss into which we have plunged."

14. The Council of Bishops of the Methodist Church adopted a statement at the Annual Meeting in Omaha, April 30, 1953, which said:

"We are dismayed and genuinely concerned that in a period when its witness is so sorely needed the church has been persistently and falsely accused in many quarters and her worldwide leadership thereby jeopardized.

"In recent weeks, one of our esteemed colleagues has been subjected to accusations that were untrue by methods that were manifestly unjust. Bishop Oxnam needs no defense at our hands. These recent accusations and insinuations have been answered in detail by him through the press and over the radio and television, and his statements, clearly and forth-

rightly made, are convincing to all unbiased and fair-minded men.

"This incident is indicative of a trend in our American life that threatens the security of our institutions and causes us to fear for the future of our long established liberties." *The Churchman*, June 1953.

15. William T. Gossett, *Are We Neglecting Constitutional Liberty? A Call to Leadership.* 38 ABAJ 817. Mr. Gossett is a vice-president and general counsel of the Ford Motor Company.

"There is considerable doubt, I think, as to the legitimacy of" the purpose of influencing public opinion (818).

* * * * *

"Congressional investigations which are launched for the purpose of inquiring into questions of personal conduct, closely resemble the inquisitorial functions of our grand juries. As all lawyers know, in any investigation or grand jury proceeding, it is inevitable that many fruitless lines of inquiry will be undertaken. And so some false leads must be pursued. The inviolate rule of secrecy in a grand jury proceeding is predicated upon the urgent necessity of protecting the good name of the many innocent persons who must be questioned and who, through no fault of their own, might be under suspicion before a determination is made as to which, if any, of those under investigation will be subjected to indictment or other action.

"But no such protection is accorded to those who are so unfortunate as to be required to testify before many of our Congressional committees. Not only are witnesses interrogated in public, but they are denied basic constitutional safeguards which in a court proceeding are granted as a matter of right, even to one who, after investigation, has been accused of a crime. The constitutional safeguards to which I refer, of course, are the rights of the accused to be informed in advance of the nature of the charges against him; his right to be confronted with the witnesses who testify against him, and to subject them to cross-examination;

his right to compulsory process for obtaining witnesses in his favor; his right to be represented by counsel; and his right to testify then and there in his own defense.

"Congressional investigations which delve into matters of personal conduct assume the aspects of a trial and thus abridge the rights of individuals, guaranteed by the Constitution. And there have been cases in which, as a result of the publicity of committee hearings, witnesses have been exposed to such penalties as dismissal from their jobs, loss of pension payments, character assassination and injury to their reputations.

"Those who would defend such practices are quick to point out that a witness before a Congressional committee is no in jeopardy—that is, he is not subject to a jail sentence by the committee in connection with the matter about which he is being interrogated. But the argument ignores the fact that the committee has the power to sully a man's reputation unmercifully, and to many men a good name is fully as important as merely being out of jail. Moreover, a committee can send a witness to jail for refusal to answer a question—even one which a court might not require him to answer.

"The practices of investigating committees thus are without proper standards. Persons are now subpoenaed before such committees and afforded no right to counsel. Although they often are subjected to the most searching cross-examination themselves, they are denied the right to cross-examine those who testify against them. If they are so-called hostile witnesses, they often are not even accorded the right to make a statement—prepared or otherwise; and if the behavior of the witness is such as not to please the committee or some of its members, he can be summarily punished.

"Some committee members seemingly have viewed the committee as a final court of justice sitting in judgment on the conduct of individuals appearing before the committee. Thus they usurp the judicial function. On the other hand, committee members can and do slander witnesses with impunity, secure in the knowledge that there can be no retaliation in court.

* * * * * *

"In such an inquiry there is no assumption that the individual is innocent until proved guilty. There are none of the safeguards of a trial to which, by the Constitution and the law, each man is entitled. Instead, there is a type of trial by public opinion, a pillorying of individuals not accused of crimes—of individuals only suspected of being engaged in or knowing something about some improper activity. And the rules are the same whether the witness is innocent or guilty.

"* * * It must be apparent that if such tactics are permissible with respect to suspected criminals, they may also be permissible with respect to persons who hold views in conflict with those of the overwhelming majority. Thus, we run the risk that we might all become guilty of imposing that 'tyranny of the prevailing opinion and feeling' which John Stuart Mill believed so serious a danger to democracy." (819-20).

16. Mrs. Agnes E. Myers in an address at the seventy-ninth annual convention of the American Association of School Administrators, in Atlantic City, February 17, 1953 (*New York Times*, February 18, 1953).

"A warning that the Congressional committees investigating schools and colleges threaten not only education but the democratic way of life was voiced here today by Mrs. Agnes E. Meyer, a member of the board of directors of the National Citizens Commission for Public Schools.

"In a major address at the seventy-ninth annual convention of the American Association of School Administrators, attended by 17,000 teachers, superintendents and key educators, Mrs. Meyer scathingly denounced the activities of Senators Joseph R. McCarthy, Republican of Wisconsin, and William E. Jenner, Republican of Indiana, and Representative Harold H. Velde, Republican of Illinois.

"Asserting that academic freedom and American democracy itself were threatened, Mrs. Meyer lashed into Senator McCarthy, calling him "our modern grand inquisitor." * * *

"'His record as an investigator is shameful,' Mrs. Meyer declared. 'He has accused innocent people of communism on mere hearsay evidence, thus traducing our American principle of law that a man is presumed innocent until proved guilty. By such methods he has weakened the morale of our Federal service and spread suspicion and fear throughout the nation. He has stirred up hatred and used every device to destroy the confidence of Americans in each other. He has used the technique of insinuation against innocent people and debauched the Senate's power of investigation by introducing authoritarian practices that are akin to the communism which he professes to hate.'

"Mrs. Meyer said that Senator McCarthy would not dare to challenge education now if the American public had organized a nation-wide defense of academic freedom when previous Congressional attacks began. Because of the tactics of Mr. McCarthy, Mr. Jenner and Mr. Velde, Mrs. Meyer asserted, the morale of the teachers has been seriously undermined.

"'The American people as a whole must now realize that they are the ones who make the climate of public opinion and that they must come to the defense of our public schools and of our institutions of higher learning,' declared Mrs. Meyer. 'For the independence of our whole educational system will be jeopardized if Velde, Jenner and McCarthy are not stopped in their tracks before they get under full sail.'

"These men, she charged, are corrupting the legislative process and debasing the Congressional power of investigation into an attack on the very foundation of liberty itself. She urged that the press, radio, television and church organizations take a firm stand against the school investigations. She warned that 'either the clergy of all denominations must now unite in a protest against these latest Congressional inquisitions, or they will be the next to burn at the stake.'"

17. Elmer Davis, *Must We Mislead the Public?* Fifth Annual Lecture sponsored by Twin Cities Local, American Newspaper Guild, CIO, and School of Journalism, University of Minnesota. Minneapolis, November 3, 1951.

> "The Founding Fathers wrote it into the Bill of Rights that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb—and thought they had taken care of that. If a man was acquitted in court, that ended it. They did not foresee that Congressional committees would take over a considerable part of the judicial process, and would hold that they are not bound by the limitation which the Constitution imposes on judicial agencies. Technically this contention is no doubt correct, since a hearing before a Congressional committee does not put a man in jeopardy of life or limb. The only penalty he can suffer, ordinarily, from Congressional condemnation, unless he is foolish enough to perjure himself, is the loss of his reputation and standing in the community—a deprivation which the average senator or representative seems to regard as trivial, at least when it happens to somebody else. The victim may also of course suffer the loss of an opportunity to make a living, at any occupation that he knows; but the Constitution says nothing about that.
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> "In any case, Congress seems to have established the principle that no man is ever acquitted, so long as a single influential member of either House is out to get him. If a committee—or three or four committees—have investigated him and found him innocent, that only means that they keep on setting up hearings before other committees, until they find one that will pronounce him guilty. Double jeopardy has been ruled out in the courts; but before Congress any man may be in multiple and perpetual jeopardy for the same offense, actual or only unconvincingly alleged.
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> "The juridical and ethical implications of this new doctrine are beyond the scope of this argument. What I am concerned with is its effect on news reporting, on the endeavor to give the public a reasonably accurate picture of what is going on. That is getting harder and harder to do; and one thing that makes it harder is

the fact that this doctrine of perpetual jeopardy has been implemented by a couple of fantastic new weapons —what is called the pertinent excerpt, and what might be called the seven-shot automatic repeating witness."

18. Fourteen prominent Bostonians, including the Episcopal Bishop of Massachusetts, the rabbi of Temple Israel, Boston, and professors at Harvard University, on May 7, 1953, issued a statement to the press that the methods of the committee were those of a "police state" and that they were "undermining the entire Constitution and our democratic system."

19. The General Council of the Presbyterian Church in the United States of America, on November 2, 1953, issued a letter to Presbyterians in which it included the following statement:

"Under the plea that the structure of American society is in imminent peril of being shattered by a satanic conspiracy, dangerous developments are taking place today in our national life. Favored by an atmosphere of intense disquiet and suspicion, a subtle but potent assault upon basic human rights is now in progress. Some congressional inquiries have revealed a distinct tendency to become inquisitions. These inquisitions, which find their historic pattern in medieval Spain and in the tribunals of modern totalitarian states, begin to constitute a threat to freedom of thought in this country.

"Treason and dissent are being confused. The shrine of conscience and private judgment, which God alone has a right to enter, is being invaded. Un-American attitudes toward ideas and books are becoming current. Attacks are being made upon citizens of integrity and social passion which are utterly alien to our democratic tradition. They are particularly alien to the Protestant religious tradition which has been a main source of the freedoms which the people of the United States enjoy." *New York Times*, November 3, 1953.

20. The Commission on Justice and Peace of the Central Conference of American Rabbis, on March 15, 1953, issued a statement denouncing the "undemocratic methods" employed in the congressional investigations conducted by Senators McCarthy and Jenner and Congressman Velde. The statement continued:

> "We believe that the national security of our country is rooted in the individual freedom of its citizens. We reject the concept that there is any incompatibility between freedom and security, and that individual freedom must be curtailed in the interest of national security." (*New York Times*, March 16, 1953.)

21. J. R. Wiggins, managing editor of the *Washington Post*, in an article, "The Printed Word" (*Library Journal*, September 1, 1953), included the following comments concerning congressional investigations:

> "When congressional investigators, however well intentioned, invade with their inquiries the schools and churches (even though they interrogate only individual teachers and churchmen and not the institutions as such), other recollections are stirred.
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> "There is good reason, in our memories, for feeling anxiety when government investigates the teacher and the clergyman. Even schoolboys can remember from their texts that so great a man as John Locke was driven by a hostile government from the University of Oxford. Since the reign of Queen Elizabeth, Englishmen have feared government tribunals empowered to exercise control of churches and schools. Her Court of High Commission was long held the most grievous tribunal of her reign. In July, 1686, James II determined to create another Court of High Commission, despite the fact that its very establishment was an outrageous violation of the law and a direct attack on the Church. As Macauley describes this investigating body:
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> 'All colleges and grammar schools, even those founded by the liberality of private benefactors, were placed under the authority of the new board.

All who depended for bread on situation in the Church or in academical institutions, from the vice chancellors of Oxford and Cambridge down to the humblest pedagogue, were at the Royal mercy. If any one of the many thousands was suspected of doing or saying anything distasteful to the government, the commissioners might cite him before them. In their mode of dealing with him they were fettered by no rules. They were themselves at once prosecutors and judges. The accused party was furnished with no copy of the charge. He was examined and cross examined. If his answers did not give satisfaction, he was liable to be suspended from his office, to be ejected from it, to be pronounced incapable of holding any preferment in future. If he were contumacious he might be excommunicated, or in other words, be deprived of all civil rights and imprisoned for life.'

"There is a contemporary ring to this description of inquisitorial power that ought to give us pause.

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"One fatal weakness marks the congressional investigations of the press, libraries, schools, and churches. Most of these inquiries have not been concerned with the development of information essential to the act of legislating. Little legislation has emerged from them. These congressional committees have been performing essentially judicial functions. In many cases, they have combined executive, judicial, and legislative functions. As Madison has wisely observed, the concentration of legislative, judicial and executive functions in a single body is the very definition of tyranny.

"The legislature is peculiarly unfitted for the discharge of judicial duty. It is especially deficient as a court of justice and its deficiencies have been well understood in Anglo-Saxon countries for 200 years.

"Macauley has well stated these weaknesses: 'However clearly political crime may have been defined by ancient laws, a man accused of it ought not to be tried by a crowd of five hundred and thirteen eager politicians, of whom he can challenge none even with cause, who have no judge to guide them, who are allowed to

come in and go out as they choose, who hear as much or as little as they choose of the accusation and of the defense, who are exposed, during the investigation, to every kind of corrupting influence, who are inflamed by all the passions which animated debate naturally excite, who cheer one orator and cough down another, who are roused from sleep to cry Aye or No, or who are hurried half drunk from their suppers to divide.'

"This, of course, is not a description of our Congress, but of the House of Commons of generations ago. But though our legislative body may have improved in sobriety and demeanor, many of the solid objections that Macauley makes against all legislative bodies acting in judicial capacity still are valid.

"And surely, anyone who had ever read Macauley's pungent summary of the fallibility of a legislature in the capacity of a court must inevitably have recalled it upon that dreadful day when the House of Representatives thundered its applause and shouted its cheers as an eminent member made the utterly baseless charge that the most respected Bishop of one of the largest Protestant denominations in this land 'served God on Sunday and the Communist front for the rest of the week.'

"Great as is our confidence in and preference for legislative agencies, we must take note of the pregnant question of the English historian, Smollett: 'What difference is it to the subject, whether he is oppressed by an arbitrary prince, or by the despotic insolence of a ministerial majority?'

"Actually, he might have pointed out that it sometimes is more baffling to contend with a hydra-headed legislative tyranny than it is to cope with a single tyrant against whom outraged public opinion can be focused."

22. Representative Jacob K. Javits, in an address before the Association of the Bar of the City of New York on December 8, 1953, on the "Protection of Individual Rights in Congressional Investigations," stated:

"Congressional investigations, particularly of subversive activities and communists, have now turned into prosecutions because of the ensuing 'penalties' to individuals of loss of reputation, livelihood and standing in the community incident to public disclosure —often even of mention—in such investigations. It is essential that the House of Representatives and the Senate respectively adopt rules of procedure which will set a tone for congressional investigating committees of fair dealing with the reputations of individuals, will give the public a standard, by which to judge, of fairness in their activities and will require the House of Representatives or the Senate as a whole, as the case may be, to assume responsibility for their respective investigating committees. The time has come for the whole Congress to regain control over its own investigating committees and to assume responsibility for their activities. Once authorized and supplied with an appropriation present congressional rules and practices, practically speaking, release investigating committees from control by the very body which created them."